Office Supreme Court, U. S.
DEC 18 1907

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, STATE OF NORTH CAROLINA, APPELLANT,

vs.

JAMES H. WOOD, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLEE.

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JAMES H. WOOD, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Statement.

This case is an appeal from an order of the court below discharging appellee from the appellant's custody.

In the Circuit Court of the United States for the Eastern District of North Carolina the Southern Railway Company, as complainant, instituted a suit in equity against the Attorney General, Assistant Attorney General, and members of the Corporation Commission of North Carolina, seeking to prevent the enforcement of two North Carolina statutes of 1907, one providing for the reduction of passenger rates (and hereinafter referred to as the passenger-rate statute) and the other providing for the reduction of joint freight rates (and hereinafter referred to as the freight-rate statute). The grounds alleged for the relief sought were that

the enforcement of those statutes, or either of them, would deprive the complainant of its property without due process of law, would deny to it the equal protection of the laws, and would in other respects contravene the Constitution of the United States. This suit is hereinafter referred to as the Rate suit.

Upon motion therefor, and upon the bill and answer as affidavits, and upon numerous other affidavits filed by the complainant, the court entered an order granting an interlocutory injunction, whereby, until the further order of the court, the defendants and all other persons were restrained from taking any steps to enforce the rates provided for in either of the statutes, and the railway company was directed to give to each person purchasing a ticket a transferable coupon representing the sum which such person, or his transferee, would, upon a final decision in the cause upholding the validity of the passenger-rate statute, be entitled to receive, and required full reports showing the revenues collected in excess of the rates provided for by either of the statutes.

Thereafter, and while the interlocutory order was in effect, the appellee, James H. Wood, a ticket agent of the Southern Railway Company, sold a ticket for intrastate transportation at a rate in excess of the rate provided by the passenger-rate statute and gave the purchaser a coupon in accordance with the provisions of the order referred to. For this act Wood was arrested upon the charge of violating the passenger-rate statute. He was tried, convicted, and sentenced by the police justice at Asheville, N. C., to serve a term of thirty days in the chain gang.

Thereupon, in accordance with Wood's petition, a writ of *habeas corpus*, directed to the sheriff of Buncombe county, was issued by the judge of the court below, and after return thereof and due hearing thereon the court below ordered that Wood be discharged from custody upon two grounds: First, that the act for which he was in custody had been done in

pursuance of an order of a court of the United States, and, second, that he was in custody in violation of the Constitution of the United States. From this order this appeal is prosecuted.

The origin and development of this case are stated in detail in the brief of associate counsel on file.

In discharging the prisoner the court stated its decision on two grounds:

First, that the act for which he was in custody had been done in pursuance of an order of a court of the United States, and, *second*, that he was in custody in violation of the Constitution of the United States.

From this order this appeal is prosecuted.

ARGUMENT.

We will discuss first the proposition that Wood was in custody for an act done in pursuance of an order of a court of the United States; second, the proposition that Wood was in custody in violation of the Constitution of the United States.

I.

ORDER OF DISCHARGE PROPER BECAUSE WOOD WAS IN CUSTODY FOR AN ACT DONE IN PURSUANCE OF AN ORDER OF A COURT OF THE UNITED STATES.

Upon this proposition we understand the contention of appellant to be that the circuit court of the United States had no jurisdiction to entertain the Rate suit, or to make the order of injunction, or to interfere in any way with the enforcement, by criminal proceedings, of the so-called "criminal laws of North Carolina."

1. THE FEDERAL COURT HAD JURISDICTION OF THE RATE SUIT.

(a) The subject-matter of the Rate suit was the protection of the railway from being subjected to public use without the just compensation secured by the Constitution, and this was a subject-matter within the jurisdiction of the Federal court.

The following propositions are now too well settled for discussion: The question whether a legislative enactment fixing rates affords just compensation is a question for judicial determination. A suit in equity is an appropriate mode of trying this judicial question. A circuit court of the United States is a proper tribunal to hear and determine a suit in equity involving this judicial question. Upon these propositions it is sufficient to cite *Chicago, etc., R. Co. v. Minnesota*, 134 U. S., 418; *Reagan v. Trust Co.*, 154 U. S., 362; *Smyth v. Ames*, 169 U. S., 466, and *Chicago, etc., Co. v. Tompkins*, 176 U. S., 167.

It follows, therefore, that the subject-matter of the Rate suit came within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina, sitting as a court of equity.

(b) A long line of decisions of this court sustains jurisdiction in similar suits against similar parties and seeking similar relief.

In *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, the jurisdiction was upheld in suits by trustees of railroad mortgages against the railroad companies, the Railroad Commission, and the Attorney General of Texas.

In *Smyth v. Ames*, 169 U. S., 466, the jurisdiction was upheld in suits by railroad stockholders against the railroad

companies, the Board of Transportation, and the Attorney General of Nebraska.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S., 167, the jurisdiction was exercised in a suit by a railway company against the State Board of Railroad Commissioners and the Attorney General.

In *Prout v. Starr*, 188 U. S., 537, the jurisdiction was upheld in a suit similar in all respects to *Smyth v. Ames*, and this court specifically affirmed the lower court's decree restraining the Attorney General from conducting a proceeding to impose penalties.

In *McNeill v. Southern Railway Co.*, 202 U. S., 543, the jurisdiction was upheld in a suit by a railway company against the Corporation Commission of North Carolina.

In Mississippi Railroad Commission v. Illinois Central R. Co., 203 U. S., 335, the jurisdiction was upheld in a suit by a railway company against the Mississippi Railroad Commission.

While, of course, the precise relation sustained by the State officers to the statutes or orders complained of varied according to the provisions of the laws of the various States, yet, as will be pointed out below, there is no fundamental or logical distinction between the cases cited and the present Rate suit. Such distinctions as exist between the present Rate suit and some of the cases cited are immaterial, and with respect to other of the cases cited are entirely lacking. It is impossible to suggest any distinction between the present Rate suit, on the one hand, and *Smyth v. Ames* and *Prout v. Starr*, on the other hand, which would defeat the jurisdiction in the present case while sustaining the jurisdiction in those cases. Those cases are strictly similar to the present Rate suit, except that in some respects the present suit is less open to jurisdictional objections than those cases were.

(c) The jurisdiction of suits against similar defendants and for similar relief has become a settled principle of Federal jurisprudence and for many years has been acted upon by the inferior Federal courts.

Omitting the cases subsequently appealed to this court and mentioned under the preceding heading, we call attention to the following cases in the circuit courts of the United States:

Mobile & Ohio R. Co. *v.* Sessions, 28 Fed. Rep., 592. (Suit against members of Mississippi Railroad Commission.)

Chicago, Milwaukee & St. P. R. Co. *v.* Becker, 32 Fed. Rep., 849; 35 Fed. Rep., 885. (Suit against members of Railroad and Warehouse Commission of Minnesota.)

Chicago & Northwestern R. Co. *v.* Dey, 35 Fed. Rep., 866. (Suit against Railroad Commissioners of the State of Iowa.)

C., B. & Q. R. Co. *v.* Dey, 38 Fed. Rep., 656. (Suit against Railroad Commissioners of Iowa.)

Southern Pacific Co. *v.* Board of Railroad Commissioners of California, 78 Fed. Rep., 236; 87 Fed. Rep., 31.

Wilmington & Weldon R. Co. *v.* Board of Railroad Commissioners, State of North Carolina, 90 Fed. Rep., 83.

Metropolitan Trust Co. *v.* Houston & T. C. R. Co., 90 Fed. Rep., 683. (Suits against members of Railroad Commission and the Attorney General of Texas.)

Northern Pacific R. Co. *v.* Keyes, 91 Fed. Rep., 47. (Suit against Board of Railroad Commissioners of North Dakota.)

Western Union Telegraph Co. *v.* Myatt, 98 Fed. Rep., 335. (Suit against the members of the Court of Visitation and the State Solicitor of Kansas.)

Wallace *et al. vs.* Arkansas Central R. Co., 118 Fed. Rep., 422. (Decision of Circuit Court of Appeals affirming decree for complainant in a suit against

members of the Board of Railroad Commissioners of the State of Arkansas.)

Louisville & Nashville R. Co. *v.* Brown, 123 Fed. Rep., 946. (Suit against the members of the Railroad Commission of the State of Florida.)

Consolidated Gas Co. *v.* Mayer, 146 Fed. Rep., 150. (Suit against the New York Gas Commission and the Attorney General of New York and the District Attorney of New York City.)

Railroad Commission of Louisiana *v.* Texas Pacific R. Co., 144 Fed. Rep., 68. (Decision of Circuit Court of Appeals, Fifth District, affirming decree in favor of appellee.)

Houston & T. C. R. Co. *et al. v.* Storey *et al.*, 149 Fed. Rep., 149. (Suits against members of the Texas Railroad Commission.)

Most of the cases cited under this heading related to restraining the enforcement of rates fixed by railroad commissions themselves, but if any question ever existed as to whether the Federal courts had the same power over rates fixed by act of legislature as over rates fixed by a railroad commission acting under legislative authority, that question has been put at rest by the decisions of this court in *Covington, &c., Co. v. Sandford*, 164 U. S., 578, *Smyth v. Ames* and *Prout v. Starr*. In other respects there may be unimportant differences between some of the cases cited and the present Rate suit; but, as will be shown below, there is no fundamental or logical distinction which would justify the entertaining of jurisdiction in those cases and the denial of jurisdiction here.

(d) The fact that the Rate suit sought to prevent the institution of judicial proceedings by State officers did not defeat the jurisdiction, and this has been repeatedly held by this court.

The idea is now suggested in some quarters that a suit against State officers to prevent them from enforcing by

judicial proceedings in the State court rates made by or under State legislative enactment, but in conflict with the Constitution of the United States, is a suit against the State itself in violation of the Eleventh Amendment. This idea seems to proceed upon the theory that the doctrine of *Osborn v. Bank of the United States*, 9 Wheat., and since repeatedly confirmed, that

> "an officer of a State may be enjoined from executing a statute of the State which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant,"

is restricted to cases of some physical interference, in the nature of tort, with property rights, and does not extend to instances where the execution of the statute can be accomplished only by the institution of judicial proceedings in the State court. This idea, if correct, would overthrow practically all of the decisions of this court and of the inferior Federal courts in rate cases. In none of those cases could the rates complained of have been enforced except by the institution of judicial proceedings in the State courts, and in many of those cases no physical act, even of a preliminary character, remained to be done by the State officers.

For example, in *Smyth v. Ames* and *Prout v. Starr* the statute required no preliminary act by the Board of Transportation or the Attorney General, and no act whatever remained to be done except to enforce those rates by the institution of proceedings, either civil or criminal, in the courts of the State.

The erroneous assumption has been suggested that this court intended by its decision in the case of *In re Ayers*, 123 U. S., 443, to hold that it was necessarily a suit against the State itself to restrain the institution by State officers of judicial proceedings in a State court to enforce a statute con-

trary to the Constitution of the United States. That decision, however, does not justify such an assumption.

That case was an original proceeding in this court by the Attorney General of Virginia for a writ of *habeas corpus* to procure his discharge from custody under commitment of a circuit court of the United States for contempt of a decree rendered in the suit of *Cooper et al. v. Marye et al.* In this suit complainants, as owners of certain Virginia bond coupons, sought to restrain the Attorney General and the Commonwealth attorneys from instituting suits in accordance with a statute of Virginia, which directed those attorneys to institute suits against all taxpayers tendering such coupons in payment of their taxes. The bill alleged that this step, together with numerous other activities of the State set out in the bill, amounted to a repudiation by the State of its debt. The question for decision was whether the suit was a suit against the Attorney General and the Commonwealth attorneys personally to prevent them from enforcing an unconstitutional statute or was in substance a suit against the State of Virginia.

The court first pointed out (pages 493, 497) that the statute which the Attorney General and the Commonwealth attorneys were seeking to enforce was not unconstitutional, and for that reason the court held (page 497) that the bill

> "does not allege any ground of equitable relief against the individual defendants for any personal wrong committed or threatened by them."

The court had no occasion to hold, and did not hold, that it would be a suit against the State to sue State officers to prevent them from enforcing an unconstitutional statute. The court held that, the relief not being sought against the defendants in their personal capacity (because the mere institution of suits under a constitutional statute could not be complained of), the object of the bill was

> "by injunction indirectly to compel the specific performance of the contract" [of the State of Virginia]

> "by forbidding all those acts and doings which constitute breaches of the contract" (p. 502).

The court, having held that the suit was in substance a suit against the State, proceeded to point out how the restraining of the State officers from instituting judicial proceedings would necessarily accomplish the purpose sought, to wit, the specific performance of the State's contract. Thus the court held that the only right asserted was in substance asserted against the State itself, and that the only remedy sought was in substance a remedy which would compel the State itself to perform that right. All the observations of the court in that case with respect to the restraining of suits by State officers should be considered in the light of the circumstances there presented. Those observations cannot apply where the effort is to prevent State officers from enforcing an unconstitutional statute, and, if so applied, that case is necessarily at variance with the rate cases in this court and in the lower courts, because the substantial effect of all those cases has been the prevention of the institution by State officers of judicial proceedings in the State courts.

The reason which, notwithstanding the Eleventh Amendment, justifies an action or suit against a State officer to obtain redress for or to prevent steps by him in the execution of an unconstitutional statute was stated as follows in *Poindexter v. Greenhow*, 114 U. S., 270:

> "A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which con-

> stitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense" (p. 288).

It is plain that there is no logical distinction, as far as the Eleventh Amendment is concerned, between (1) an action for damages for a tort committed in the execution of an unconstitutional statute; (2) a suit to restrain commission of a tort in the execution of an unconstitutional statute, and (3) a suit to restrain the execution of an unconstitutional statute by the institution of judicial proceedings. When a court of equity is called upon to consider whether a suit of class 2 or class 3 can be maintained the court must consider whether such a showing is made as to establish jurisdiction in equity, but the decision of this question does not involve the application of the Eleventh Amendment.

Let us assume the existence of a statute which is unconstitutional and which may be enforced by a State officer by seizing property of the person against whom the statute is directed, or by instituting judicial proceedings against that

person. If the officer seizes the property, an action for damages will, of course, lie against him. If the officer threatens to seize the property and the circumstances are such that the seizure would leave the owner without any adequate remedy at law a court of equity will entertain a suit to determine the right of the complainant and to enjoin the seizure. If the officer threatens to bring a myriad of actions to effectuate such seizures and these actions would be so numerous and vexatious as that the owner's remedy by way of a separate defense to each of these actions would be inadequate, then a court of equity will entertain a suit to determine the right claimed by the bill and to restrain the multiplicity of actions, but the Eleventh Amendment is no more involved in the determination of jurisdiction with respect to the suit to restrain a large number of actions than it is with respect to the suit to restrain a direct seizure of the property. In both instances the question is whether a sufficient showing is made to justify the intervention of a court of equity.

As will be pointed out below, the intervention of a court of equity in a case like the present is of paramount importance, and no greater injury to property can be imagined than the injury which would result from the enforcement of such statutes as are here involved by the institution of the innumerable proceedings which would be possible under the statutes.

Each of these statutes gives individuals aggrieved by violation of the statutes the right to recover heavy penalties of the railroad company. If the statute is unconstitutional, it cannot be questioned that a court of equity has the right to entertain a suit on behalf of the railroad company and against the individuals threatening to sue for the penalties or against the representatives of the whole class of such individuals to determine the right of the railroad company and to prevent the great injustice of a vast multiplicity of separate proceedings in each of which the same defense would have to be

made. If a court of equity has the jurisdiction to entertain such a suit against individuals to prevent the execution by those individuals of an unconstitutional statute, certainly the court has the right to entertain a similar suit against State officers, because, as shown in *Poindexter v. Greenhow*, a State officer in the execution of an unconstitutional statute stands simply upon the footing of an individual.

If the Eleventh Amendment had the effect of prohibiting the Federal courts as courts of equity from entertaining suits to restrain State officers from proceeding by vast numbers of separate judicial proceedings to enforce unconstitutional enactments, then an easy way exists whereby the States may evade all the limitations put upon their powers by the Federal Constitution.

In the case of *Mississippi Valley Railroad Commission v. Illinois Central R. Co.*, 203 U. S., 335, this court affirmed a decree enjoining the members of the Mississippi Railroad Commission from proceeding by suit or otherwise to enforce an order which involved an unreasonable interference with interstate commerce. If the Eleventh Amendment had the effect of preventing such injunctions, the States could interfere with interstate commerce to an almost unlimited extent. They could provide for enforcement of the acts unconstitutionally interfering therewith by the institution of large numbers of separate proceedings, and the multiplicity, vexation, expense, and uncertainty of all these proceedings, even aside from the question of penalties, would deter the railroad companies from disobeying such unconstitutional requirements, and the result would be that interstate commerce would be hampered, contrary to the Constitution of the United States at the will of the States, and such unconstitutional action could always be sheltered by refuge under such a construction of the Eleventh Amendment.

(e) *The fact that the Rate suit sought to prevent the institution of criminal proceedings on behalf of the State did not defeat the jurisdiction, and this has been repeatedly held by this court.*

In *Reagan v. Trust Co.*, 154 U. S., 362, it appeared that the Texas statute provided, in section 14, that if any railroad, its agent or officer, should charge a greater rate than is fixed by the Railroad Commission, such company, agent, or officer should be deemed guilty of extortion, and should forfeit and pay to the State of Texas a sum of not less than $100 nor more than $5,000 and various other penalties or forfeitures as imposed by other sections of the statute. By section 19 of the act it was provided that all of the penalties (except those provided in section 17 to be recovered by individuals aggrieved) should be recovered and suits thereon should be brought in the name of the State of Texas in the proper court by the Attorney General or under his direction. The decree enjoined the Attorney General "from instituting or authorizing, or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act." This court affirmed that decree.

In *Smyth v. Ames*, 169 U. S., 466, the statute prescribing the rates complained of provided in section 9 that any common carrier violating the statute should upon conviction thereof "be fined in any sum not less than $1,000 nor more than $5,000 for the first offense, and for the second offense not less than $5,000 nor more than $10,000, and for the third offense not less than $10,000 nor more than $20,000, and for every subsequent offense and conviction thereof shall be liable to a fine of $25,000; provided that in all cases under this act either party shall have the right of trial by jury." The Supreme Court of Nebraska considered this section of this statute in State *v.* Missouri Pacific R. Co., — Neb., —; 90 Northwestern, 877, and said:

"Where the legislature has not indicated a preference, penalties and forfeitures may be recovered by the State in either civil or criminal actions, but the rule with respect to fines is different. The primary definition of a fine is a pecuniary punishment inflicted by the sentence of a court exercising criminal jurisdiction, and this is the sense in which the term is used in common speech. We do not remember having ever heard the action of a court giving judgment in a civil case described by the use of the word 'fine.' It was, of course, within the power of the legislature to provide for the enforcement of the law by civil action, but the evidence that it intended to do so is entirely wanting. The language it employed is significant. It spoke in the terminology of the criminal law. * * * The criminal code expressly declares that all fines therein provided for shall be enforced by criminal action and it was beyond all doubt the intention of the legislature that the punitive provisions of the act in question (section 9 of house roll 33) should be enforced in like manner" (p. 878).

In section 398 of the Criminal Code of Nebraska the offenses denounced by section 9 of this statute were indictable offenses, and under sections 578 and 579 of the Criminal Code of Nebraska it would seem that these offenses could also be prosecuted by the ordinary information for crimes, misdemeanors, and offenses.

In *Smyth v. Ames* the Attorney General of Nebraska was "enjoined from bringing, aiding in bringing or causing to be brought, any proceeding by way of injunction, mandamus, civil action or indictment, against said companies or either of them, or their receivers, for or on account of any action or omission on their part commanded or forbidden by said act."

This court affirmed that decree.

The same statute and an injunction of similar character was involved in the case of *Prout v. Starr*, 188 U. S., 537. The Circuit Court upon a supplemental bill extended the order of injunction to Prout, who was the successor as At-

torney General of Smyth, who had originally been made defendant to the cause. Prout appealed and claimed the right, notwithstanding the injunction, to institute penal proceedings in the State court. This court affirmed the decree of the Circuit Court, and held that in view of the proceeding in the Federal court Prout, as Attorney General, had no right to institute a proceeding in a State court to recover penalties for alleged violation of the rate statute, and said:

> "The jurisdiction of the Circuit Court could not be defeated or impaired by the institution by one of the parties of subsequent proceedings, whether civil or criminal, involving the same legal questions in the State court" (p. 544).

In *McNeill v. Southern Railway Co.*, 202 U. S., 543, it appeared that the Corporation Commission of North Carolina had adopted a regulation unreasonably interfering with interstate commerce.

Section 1086 of the North Carolina Revisal of 1905 provided that if any railroad company should violate a regulation of the Commission and failed upon full notice to make full recompense for the injury done thereby such company should incur a penalty for each offense of $500. Section 1087 provided that any railroad company refusing to obey any regulation of the Commission should, in addition to the other penalties, forfeit the sum of $500 for each offense, to be recovered in an action to be instituted in the name of the State on the relation of the Corporation Commission, and that each time such company should continue to violate any such regulation should be a separate offense.

The Circuit Court entered a decree whereby the court "perpetually enjoined the enforcement of the order of the Corporation Commission and the bringing of actions to recover penalties or damages for a violation of that order" (p. 547). That decree was affirmed by this court, which in the course of its opinion pointed out that the jurisdictional

amount of $2,000 was involved, because, among other things, the controversy involved "the right to enforce against the railway company the payment of statutory penalties much in excess of $2,000."

In *Mississippi Railroad Commission v. Illinois Central R. Co.*, 203 U. S., 235, the Commission and its members and clerks were enjoined from enforcing an order of the Commission compelling the complainant railway company to stop certain of its trains at a designated station, the order being held to be an illegal interference with interstate commerce.

Section 4331, Annotated Code Mississippi (1892), provides that it shall be the duty of the Commission "to see that all the laws, civil and penal, whether contained in this chapter or not, affecting railroads and other common carriers, are complied with and to prosecute all offenders."

Section 4329, Annotated Code of Mississippi (1892), provides:

> "If any railroad or other common carrier * * * shall fail to comply with any lawful order of the Commission or to conform to any of its resonable rules and regulations * * * it shall be liable to a penalty of five hundred dollars for every such failure or overcharge not otherwise punished, to be recovered by action in the name of the Commission in any county where such failure may occur or overcharge be made; * * *"

It is certainly too late now to contend in this court that the enforcement of a rate statute even by criminal process may not be restrained by the Federal court.

The general doctrine that criminal proceedings as distinguished from civil proceedings may not be enjoined is a doctrine which has no relation to the Eleventh Amendment, but which relates exclusively to the powers of courts of equity and is a doctrine which applies equally to the Federal courts, the State courts, and the English courts.

The doctrine had its origin in the idea that the jurisdiction of a court of equity is confined to the protection of property rights. This is made clear by the discussion of the subject in the case of *In re* Sawyer, 124 U. S., 200, where it was declared that "the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or pardon of criminals, or misdemeanors, or over the appointment of public officers."

In that case the question before the court was whether the United States Circuit Court, as a court of equity, had jurisdiction of a bill to stay a hearing before a committee of a city council of charges against the complainant, who was a city officer, and to prevent the removal of the complainant from his office. The court held that no property right was involved.

Not only has this court repeatedly sanctioned the restraint of criminal proceedings in rate cases, but it has announced the general doctrine that a court of equity has the power to restrain criminal proceedings when necessary to the protection of property rights. In *Davis & Farnham Mfg. Co. v. Los Angeles*, 189 U. S., 207, 218, the court said:

> "It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding (*Springhead Spinning Co. v. Riley*, L. R., 6 Eq., 558)."

The case of *Springhead Spinning Co. v. Riley*, L. R., 6 Eq., 551, was a case where the complainant sued to enjoin certain trades unionists from committing acts amounting to crimes and which tended to destroy or impair the value of

the company's property. The court in granting the injunction said:

> "The jurisdiction of this court is to protect property and it will interfere by injunction to stay any proceedings whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable or comfortable for use or occupation."

In *Dobbins v. Los Angeles*, 195 U. S., 223, 241, the court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity" (*Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 218, and cases therein cited)."

(f) The defendants to the Rate suit were appropriate and sufficient to give the court jurisdiction.

It is insisted that the Rate suit was a suit against the State in contravention of the Eleventh Amendment, because the Corporation Commission and the Attorney General were not "specially charged" with any duty respecting the enforcement of the passenger rate statute. We shall point out below in our more detailed discussion of the case of *Fitts v. McGhee* that opposing counsel misunderstand that case when they assume that a suit against State officers to prevent the execution of an unconstitutional statute is a suit against the State if its officers are not "specially charged" with the enforcement of the statute, but is not a suit against the State if such officers are "specially charged" with such enforcement.

For the present, however, we shall content ourselves by calling attention to the fact that in *Fitts v. McGhee* this court stated that the case of *Smyth v. Ames* was not a suit against the State, because the defendants "were officers of the State specially charged with the execution of a State enactment

alleged to be unconstitutional, but under the authority of which it was averred they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's right" (172 U. S., 529), and to the further fact that in *Smyth v. Ames* the Board of Transportation and the Attorney General (who were the State officers sued) had a decidedly more remote connection with the enforcement of the statute there in question than the Corporation Commission and Attorney General of North Carolina have with respect to the passenger-rate statute.

The Nebraska statute involved in *Smyth v. Ames* was an act of 1893 and was "self-executing." The statute prescribed the rates and the fines for failure to observe those rates. The statute imposed no duty whatever upon the Board of Transportation or upon the Attorney General, or upon any other officer or person with respect to the enforcement of the rates prescribed by the statute. The only connection which the Board of Transportation had with the enforcement of the rates prescribed by the statute was that, by a separate statute dealing with the board's general duties, it was provided that the board should have "general supervision of all railroads operated by steam in the State." The Attorney General was a member of the Board of Transportation. The only connection which the Attorney General as Attorney General had with the enforcement of the statute was by virtue of his general discretionary authority to appear for the State and his duty to consult with and advise the prosecuting attorneys in all matters pertaining to the duties of their office (Compiled Statutes of Nebraska, 1893, ch. 72, art. 8, sec. 17; ch. 83, art. 5, secs. 1*a* and 3). These provisions are printed in Appendix I in parallel columns with provisions of the Statutes of North Carolina.

Section 1036 of the Revisal of 1905 of North Carolina, which gives the Corporation Commission general control and supervision of railroad companies, imposes by itself upon that Commission fully as much of a "special charge"

with respect to the execution of the passenger rate statute as was imposed by the law of Nebraska upon the Board of Transportation with respect to the execution of the rate statute involved in *Smyth v. Ames.* In addition, section 1113 of the Revisal of 1905 makes it the duty of the Corporation Commission, "whenever in its judgment any corporation has violated any law," to give notice thereof, and if the violation shall continue it is provided that the Commission "shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient." This is a specific duty with respect to every statute concerning railroad companies, which finds no counterpart whatever in the Nebraska statutes. Not only does the Attorney General of North Carolina by subsection 1 of the Revisal of 1905 have the same general authority as the representative of the State as characterized the Attorney General of Nebraska, but in addition he has the specific connection with every statute relating to railroad companies prescribed in section 1113 just referred to; and furthermore subsection 2 of section 5380 of the Revisal of 1905 provides that, at the request of the Corporation Commissioners, "he shall prosecute and defend all suits relating to matters connected with their" department. There is no corresponding provision in the laws of Nebraska. Thus the Attorney General of North Carolina, as Attorney General, is specifically identified with the enforcement of all statutes pertaining to railroad companies in a way which was wholly lacking in Nebraska.

If the Board of Transportation and the Attorney General in the Nebraska case were "specially charged" with the execution of the statute under consideration there, certainly the Corporation Commission and Attorney General of North Carolina are "specially charged" with the enforcement of the passenger rate statute. There is no feature of the present Rate suit which could be made the basis of a claim that the suit is a suit against the State that would not apply with stronger force to the case of *Smyth v. Ames.*

In addition to all this, the Corporation Commission of North Carolina was given express duties by the passenger rate statute itself with respect to the classification of the railroads, the exemption of certain railroads, the publication of the rates, and the determination where mileage books should be sold. Whether performance of those duties constituted or not a condition precedent to the going into effect of the rates (and they necessarily did as to the mileage books), they certainly were a distinct element connecting the Corporation Commission with the statute in question, and make still more clear the fact that the Commission had an important and substantial connection with the enforcement of that statute.

The point has been suggested that this suit as to the Corporation Commission and Attorney General is a suit against the State, because the statute may be executed without the interposition of those officers, or, in other words, is a "self-executing" statute. Any such distinction, if maintainable, would overthrow the decision of this court in every one of the rate cases.

In *Reagan v. Trust Company* the defendants were the railroad companies, the members of the Railroad Commission, and the Attorney General, and the court held that the suit was not against the State, and proceeded upon the theory that appropriate and sufficient defendants were before the court. But the rates prescribed by the Commission could have been enforced by any shipper who had not only his common-law rights, if the rates were valid, but in addition had the right under the statute to heavy statutory penalties recoverable in his own name.

In *Smyth v. Ames* the defendants were the railroad companies, the members of the Board of Transportation, and the Attorney General. The court held that the suit was not a suit against the State, and proceeded upon the theory that appropriate and sufficient defendants were before the court.

Yet every shipper could have enforced the statute, if valid, and could have recovered not only such damages as he might have sustained, but in addition the statutes gave him a reasonable attorney's fee. Moreover, every grand jury could have indicted the company for violating the statute, and every county attorney could have inaugurated prosecutions by information and could have conducted the prosecutions by indictments. It is impossible to suggest any self-executing feature pertaining to the passenger rate statute that did not exist with reference to the Nebraska statute.

In *Prout v. Starr* the same condition, of course, prevailed as in *Smyth v. Ames.*

There never has been a rate case where the rates complained of could not be enforced by some person who was not a defendant to the proceeding, and yet the court has never held that the absence of other defendants or the fact that persons not defendants could enforce the statutes would convert into a suit against the State a suit which would otherwise be within the jurisdiction of the court.

> *(g) The Rate suit being against appropriate and sufficient defendants, the court had jurisdiction of, and could and must deal with, the entire subject-matter of the controversy.*

Every rate case in this court has proceeded upon the theory just stated. As we have pointed out, there never has been a case where the statute, if valid, could not be enforced by persons who were not before the court, but the court has not, on that account, hesitated to proceed upon the idea that it had the right to deal, and ought to deal, with the entire subject-matter, and that the decision of the court would accomplish the purposes for which a court of equity takes jurisdiction of such a proceeding.

The only parties, other than the carrier, who are pecu-

niarily interested in the questions are the shippers and passengers.

> *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, 390; *Missouri, etc., Railway Company v. Missouri Railroad, etc., Commissioners*, 183 U. S., 53.

Although in many cases the Federal courts of the United States have dealt comprehensively with the question of the reasonableness of rates, the real parties in interest, to wit, the shippers or passengers, have not been before the court.

In *Reagan v. Trust Company* the defendants were the railroad companies, the members of the Railroad Commission, and the Attorney General. No shipper was a party, although the shippers were interested in the rates charged them by the railroad companies, and, in addition, were interested in the statutory penalties recoverable in their own names. In *Smyth v. Ames* the defendants were the railroad companies, the members of the Board of Transportation, and the Attorney General. No shipper was a party, although the shippers, in addition to being pecuniarily interested in the rates charged them, were also given by statute an attorney's fee in any action brought against the railroad company for charging more than the statutory rates. No county attorney was a party, although the county attorneys throughout the State had the right to enforce the statute by conducting proceedings to recover the penalties prescribed by the statute. In *Chicago, &c., Co. v. Tompkins*, 176 U. S., 167, the defendants were the Railroad Commission and the Attorney General. No shipper was a party, although interested in the rates. In *Cotting v. Kansas City Stock Yards Co.* the defendants were the Stock Yards Company and the Attorney General. None of the persons interested in the charges made by the Stock Yards Company was a party, and this court acted upon the assumption that it was not necessary for the Attorney General to be a party, directing a dismissal of the

suit as to him without prejudice, while directing the entry of a decree perpetually enjoining the Stock Yards Company from observing the statutory rates. The case of *Prout v. Starr*, 188 U. S., 537, was similar in all respects to *Smyth v. Ames.*

Yet in every one of the cases mentioned the court proceeded upon the assumption that it was in a position to control the whole subject-matter before it and to give the railroad company full relief.

In *Smyth v. Ames*, 169 U. S., 466, 517, the court said:

> "Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, *can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute.* The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. *The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of*

> *equity is competent to meet such an emergency* and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which the highway is maintained."

The case of *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S., 368, was a suit by the railway company to restrain defendants from enforcing ordinances reducing rates of fare. The court held that a court of equity had jurisdiction and said:

> "Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing, but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of non-payment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.
>
> "The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom,

and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned, such belief being based upon the existence and terms of such ordinances.

"The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinance of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. *An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation*" (pp. 379, 380).

The court pointed out that no penalties were fixed in the ordinances and quoted from *Smyth v. Ames* to the effect that the transactions of a single week would expose the company to a vast number of suits, to say nothing of the heavy penalties. The court held the same principle applied although no penalties were provided. The court further said:

"It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and *once for all, and thus a multiplicity of suits and other complications prevented.*

"Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law

> (and no such objection has been taken at any time, and has not been insisted upon before us), we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it."

The case of *Cleveland v. Cleveland City Railway Co.*, 194 U. S., 517, was a similar case. Upon the subject of jurisdiction in equity the court said:

> "Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates over the same line, leading to consequences dangerous to the public interest, peace and tranquillity, the extent of which it would be difficult in advance to perceive. And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in Detroit *v.* Detroit Citizens' Street R'y Co., 184 U. S., 368" (p. 531).

None of the persons interested in the rates charged by the street railway company and entitled to assert a cause of action for any results flowing from the company's charging in excess of the legal rate was a party to either of the suits last referred to.

In all the cases the idea was clearly expressed, and in all similar cases which have arisen the idea has been neces-

sarily implied, that the court, by virtue of the proceeding before it, had jurisdiction of the subject-matter with which it was dealing and had authority to prevent all the confusion and controversies and multiplicity of civil actions and criminal prosecutions which would arise but for the assumption by a court of equity of jurisdiction over the entire subject-matter.

It necessarily follows, from the nature of the subject and from the way in which that subject has been considered and dealt with by this court, that the question whether a set of rates prescribed by or under legislative authority and alleged to violate the constitutional rights of the railroad company shall be enforced constitutes a single subject-matter which can be and ought to be heard and determined in a single equitable proceeding which will bind all parties. Upon any other assumption, all that has been done by the courts in this direction would have been futile. If the decrees granted by the courts in the cases which have arisen were binding only upon the persons who were defendants in those proceedings, and if every other officer or individual was left free to assert in the State courts any authority or right possessed by him under the statutes or at common law, the result would have been that every decree ever entered in any such case could have been nullified.

The underlying theory of the decisions of this court upon this subject has been that the subject-matter was one affecting the interests of a vast number of persons, all of whom could not possibly be brought into court, but that at the same time equitable principles and public policy require that the subject-matter shall be comprehensively and conclusively dealt with in a single proceeding, and that such proceeding may be maintained and the entire subject-matter completely disposed whenever there are appropriate defendants and the court is justified in assuming that the interests of both sides of the controversy are fairly represented.

In *Reagan v. Trust Co.* this court affirmed a decree in a suit brought by mortgage trustees restraining the railroad company itself from complying with the rates of the commission. In *Smyth v. Ames* this court affirmed a decree in a stockholders' suit restraining the railroad company itself from observing the rates fixed by statute. In *Cotting v. Kansas City Stockyards*, 183 U. S., 79, this court in a stockholders' suit directed the entry of a decree restraining the stockyards company itself from observing the rates fixed by statute. Manifestly this court would not have sanctioned such decree in any of these cases unless the court had been of opinion that the circuit court entering the decree had the power to protect the corporation in its observance of the decree and to prevent any interference by any person with the right of the corporation to comply with that decree. Such conclusion could not have been reached except upon the theory that the court had before it in each of those cases the whole subject-matter of the controversy, and that the shippers or customers who alone besides the corporation had a pecuniary interest in the rates affected were precluded by the decree which was rendered. The State did not have any pecuniary interest to be affected, and the court would not have permitted any procedure on the part of the State simply upon the basis of its governmental interest in enforcing its statutes which would tend to coerce the corporation into violating the decree of the Federal court. Such result could only have followed upon the idea that appropriate and sufficient defendants were before the court to enable the court to deal comprehensively and conclusively with the whole subject-matter. There can be no question whatever in the present Rate suit that appropriate defendants were before the lower court, defendants who had no ground for objecting to being sued and who sufficiently represented the persons who were pecuniarily interested in the result adversely to the railroad company. This is all the court has required in any case.

2. THE ORDER OF INJUNCTION WAS WITHIN THE POWER OF THE COURT.

This Rate suit was a proceeding to protect the property of the railroad company from unconstitutional invasion. The proceeding involved the consideration of the question whether the rates prescribed by statute afforded just compensation within the meaning of the Fourteenth Amendment for the use of the company's property, and further involved and called for whatever action the court might deem necessary to prevent the railway company from being compelled to devote its property to public use for less than a just compensation. It would have been utterly impossible for the court to exercise its jurisdiction without the power in a proper case to enter an interlocutory decree enjoining, until the further order of the court, the restriction of the carrier to the compensation prescribed by the statute complained of. The judicial power of the courts of the United States is complete within the limits defined by the Constitution and laws of the United States. When the protection of property comes within those limits that judicial power may take hold of the situation from that moment and may instantaneously afford whatever protection it may decide to be necessary. Any other theory would render the judicial power of the United States partial and incomplete. It would distinguish the Federal courts of equity from all other courts of equity to say that the Federal courts of equity in their discretion could not preserve an existing status pending final determination. The validity or invalidity of the North Carolina statute must depend in a case like this upon the determination of the Federal court. If the Federal court has the power upon final hearing to hold that the compensation fixed by statute is unjust, and that the carrier shall not be restricted thereto, it certainly has the power upon preliminary hearing to hold that there may be a temporary suspension of the plan to restrict the carrier to that compensation.

A great many instances are afforded by the cases already cited of interlocutory orders similar to the one involved in the present Rate suit. Such orders were made in *Reagan v. Trust Co., Smyth v. Ames, Cotting v. Kansas City Stockyards, Prout v. Starr, McNeill v. Southern Railway Company*, and *Mississippi Railroad Commission v. Illinois Central R. Co.*

In *Cotting v. Stockyards*, 183 U. S., 79, the circuit court decided that the rate statute was constitutional, and yet, believing the question to be doubtful, enjoined the enforcement of the statute pending an appeal to the Supreme Court. This procedure was mentioned with evident approval in the opinion of this court.

There has never been any suggestion in any decision of this court or any inferior Federal court of any lack of power upon the part of a circuit court, sitting as a court of equity, to grant an interlocutory injunction suspending the enforcement of a State enactment, provided the court had the power upon final hearing to render a decree perpetually restraining the enforcement of the State enactment. Any other view would simply mean a unique limitation upon the judicial power of the courts of the United States and also upon the enforcement of every constitutional limitation upon the powers of the States. It would mean that between the effective date of a State enactment and the time of final hearing thereon in a Circuit Court of the United States, there could be no protection whatever for any property rights unconstitutionally invaded by the enforcement of that enactment.

The suggestion that the enforcement of the State statute cannot be restrained by a Federal court until the Supreme Court of the United States shall have pronounced such statute unconstitutional would involve a still further limitation, greater in quantity, but not in quality, than the limitation upon the judicial power of the United States already discussed.

The Circuit Court having the power to make the interlocutory order which it made, there is no occasion in this proceeding for any discussion as to the propriety of that order. It may be pointed out, however, that the action of the Circuit Court was eminently just, because limiting the railway company to the statutory compensation would have meant an irreparable loss to the railway company in the event such compensation should be found to be unjust, whereas the suspension of the plan to limit the railway company to that compensation preserved the rights of all parties, because the court required the railway company to give to each passenger a coupon showing how much the passenger or the bearer of the coupon was entitled to recover in the event the statutory rate of compensation was held to be just, requiring the railway company to give a bond to pay the coupons in case the statute was upheld, and to report to the court from time to time as to the amounts collected in excess of the statutory compensation. Moreover, the order was not made until after full hearing upon affidavits of numerous witnesses of high standing to the effect that the statutes involved, if enforced, would result in the railroad company performing its entire interstate business upon a basis which would yield a return of less than half of one per cent. upon the value of the property as assessed for taxation. The members of the Corporation Commission, though presumably familiar with every fact which would justify the statutory rates and though actively resisting the motion, submitted no affidavits whatever other than their answer in opposition to the affidavits on behalf of complainant.

3. Wood's act, for which he was imprisoned, was in pursuance of the order and was an essential step in carrying out the judgment of the court.

The judgment of the court was that until the further order of the court the complainant could continue to charge its existing rates, and that the enforcement of the statute ought

to be suspended, and the interlocutory order was made to accomplish this decision. If the various agents of the company had refused to collect more than the statutory rate, they would have defeated the intention of the court; and if they had done this with knowledge of the injunction, they would have been guilty of contempt of court. Wood sold the ticket at the established rate and gave the purchaser the coupon required by the court's order. These were essential steps to carry out the court's decision, and if these steps had not been taken by Wood, the court's order with respect to that transaction would have been nullified. If the court had the power to make the order, it was absolutely necessary for Wood and all other agents of the company to observe the order, to the end that the jurisdiction of the court might be upheld and its decision carried into effect.

4. WOOD'S RELEASE UPON WRIT OF HABEAS CORPUS WAS A LAWFUL AND ESSENTIAL STEP IN CARRYING OUT THE DECISION OF THE COURT AND ENFORCING THE JURISDICTION OF THE COURT.

Section 753 of the Revised Statutes of the United States clearly sanctions the use of the writ of *habeas corpus* in the present case, because Wood was in custody for an act done in pursuance of an order of a court of the United States. That section reads as follows:

> "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted

> under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The right of the court to protect its order and process by the issue of the writ is unquestioned.

The expediency of the action of the court is manifest.

The court had decided that the passenger-rate statute ought not to be enforced pending final determination of the question. This decision would have been absolutely nullified if the agents of the railway company could have been imprisoned by the State authorities. This is not a mere surmise as to possible consequences, but is simply a statement of what was imminent at the time of Wood's arrest and subsequent discharge. Upon this point the court below in its opinion said:

> "Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the superior courts of the State, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employees of the railroads and its officials be sent before the grand jury, in order that the State may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the State, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by the United States Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the injunction which was granted by the Circuit Court, and to practically defeat its jurisdic-

> tion. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests, taking place in widely separated portions of the State, present serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the State. Obstacles are being thrown in the way of inquiry by this court on writ of *habeas corpus* into the legality of arrests, and this seems to be the deliberate policy of those representing the State."

Not only was the supremacy of the judicial power of the United States menaced by the action of which the arrest and conviction of Wood was a part, but the whole interstate commerce of the Southern Railway Company and its transportation of the United States mails were vitally involved.

The court below in its opinion said:

> "If the criminal prosecutions against the agents, conductors, and employés are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business."

It is difficult to conceive of a more urgent case for the use of the writ of *habeas corpus* than existed in the present proceeding.

Illustrations of the discharge of persons in custody (under State authority) upon writs of *habeas corpus* by Federal courts to effectuate their jurisdiction are afforded by the cases of:

U. S. *v.* Spink, 19 Fed., 631.
In re Houston, 94 Fed., 119.
Anderson *v.* Elliott, 101 Fed., 609.
State *v.* Laing, 133 Fed., 887.

5. THE CASE OF FITTS V. MCGHEE IS NOT OPPOSED TO ANY OF THE FOREGOING PROPOSITIONS.

It is not belived that the jurisdiction of the Circuit Court of the United States would have been questioned but for a misconception upon the part of opposing counsel and their associates with respect to the effect of this court's decision in *Fitts v. McGhee*. It is quite evident from the terms of the freight-rate statute and of the passenger-rate statute, and from the subsequent happenings in North Carolina, that it was generally believed by the members of the legislature of that State that the case of *Fitts v. McGhee* afforded a method of rendering State rate statutes "injunction-proof," and of coercing railroad companies, through the imposition of heavy penalties, into observing rates, whether unconstitutional or not.

Therefore a careful examination of the case of *Fitts v. McGhee*, 172 U. S., 516, seems advisable. In this case an Alabama statute of February 9, 1895 (Alabama Laws 1894-1895, p. 375), prescribing rates of toll for a bridge at Florence, Alabama, was attacked, upon the ground that the statute impaired the obligation of a contract between the State and the bridge company, and that the statute would operate to deprive the bridge company of its property without due process of law. The statute imposed for violation thereof penalties upon the bridge company recoverable only by the indivaduals aggrieved. *This was the only method provided in that statute or in any other law for the enforcement or administration of that statute.* No public officer was charged with any duty of supervision, administration, prosecution, or enforcement under any law with respect to the statute in question.

The whole tenor of the act showed that, as in many other instances, the State had merely prescribed a rule of action for the benefit of individual members of a part of the public and had left the enforcement of that rule to those individuals.

The statute evinced no suggestion of any policy to identify the State officers with the enforcement of the regulation. This situation was all the more natural in view of the purely local character of the regulation, affecting only traffic of a purely local or neighborhood character over a single bridge.

Under these circumstances no State officer was in the attitude of proposing to enforce, or was connected with the enforcement of, the statute against the bridge company. With no color of plausibility could the claim be made, which was properly made in *Pennoyer v. McConnaughy,* 140 U. S., 1; *Reagan v. Trust Company,* and *Smyth v. Ames,* that particular State officers were about to enforce an invalid statute, and therefore those officers should be made defendants to a bill in equity and enjoined from taking such steps to the injury of the complainant. In the Alabama case there was a complete absence of any personal connection between any State officer and the bridge company with respect to the statute in question.

The court emphasized this condition by calling attention to *Reagan v. Trust Co.* and to *Smyth v. Ames* among other cases and saying:

> "Upon examination it will be found that the defendants in each of those cases were officers of the State specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which it was averred *they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights*" (p. 529).

The vital distinction, therefore, between *Reagan v. Trust Co.* and *Smyth v. Ames* on the one hand and *Fitts v. McGhee* on the other hand is the fact that in the two former cases the State officers were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, and therefore had such a personal connection with the enforcement of that wrongful statute as to make them the

proper subjects of injunction, whereas in the latter case it could not be claimed by any plausible pretense that any State officers were committing or were about to commit any such steps, and there was entirely lacking that personal connection on their part with the enforcement of the statute which would justify their being personally sued.

Under these circumstances the receivers operating the bridge elected to test the constitutionality of the statute in a proceeding against the State in its governmental capacity as a convenient representative of the people affected by the statute. Accordingly the suit was brought against the State of Alabama *eo nomine* and its Governor and Attorney General, and was confessedly a suit against the State "to test the constitutionality of the statute." Subsequently the suit was dismissed as to the State, but the character of the allegations against the Governor and Attorney General was not substantially changed, and the suit remained, what it was at the outset, a suit against the State.

In the case of *In re Ayers,* 123 U. S., 443, the court decided that the suit could not be regarded as a suit against the defendant officers, because the statute they were about to enforce was constitutional, and hence their action in enforcing that statute could not be regarded as a personal wrong to the complainants. In *Fitts v. McGhee* the court decided that the suit could not be regarded as a suit against the Governor and Attorney General personally because they were not "about to enforce" the statute at all. In each of the cases the necessary result was that, as the suit could not be regarded as a suit against the officers personally, therefore it must be regarded as brought against them in their representative capacity.

The court, holding that the case of *Fitts v. McGhee* could not be regarded as a suit against the Governor and Attorney General in their personal capacity, but must be regarded as a suit against the State itself, summed up the whole case in the following passage:

> "If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. *If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespass or wrong*" (p. 530).

We repeat that the vital point was that the Governor and Attorney General were not committing or attempting to commit the wrong of instituting judicial proceedings to enforce an unconstitutional statute, and therefore they could not be "individually proceeded against" to prevent such wrong.

It has been urged at times that this court by its decision in *Fitts v. McGhee* established the doctrine that a suit cannot be maintained to enjoin State officers from enforcing an unconstitutional statute unless the duty to enforce that statute is expressly imposed in the very statute which is claimed to be unconstitutional. Clearly no such construction can properly be given to the court's opinion. The court mentioned the fact that the Governor and Attorney General were not "specially charged" with the enforcement of the statute, but clearly this was done to emphasize the fact that those officers had no such personal connection with the enforcement of the statute as to render it proper to make them personal defendants. The fact that the officers were not specially charged

with the enforcement of the statute was mere evidence proving, or rather corroborating, the view that they were not about to commit the wrong of enforcing the statute complained of. The court's language did not express the idea, and cannot rationally be construed as implying the idea, that the wrong done to an individual by the enforcement of an unconstitutional statute may be prevented by a suit against the State officer enforcing the same where the duty to enforce the statute is expressly imposed by that very statute, but may not be prevented where the duty is imposed by some other statute, or where the wrongful act of enforcement is committed simply by virtue of some general authority without any specific duty in regard thereto being in existence.

Upon this proposition we again remind the court of the reason mentioned on page 19 of this brief, which underlies the doctrine that a suit against a State officer to restrain the execution of an unconstitutional statute is not a suit against the State. The idea is that a State officer in the execution of an unconstitutional statute is stripped of his authority as an officer and has no more justification than an individual for the course which is complained of.

If a bill in equity brought by a complainant against a defendant who is not a State officer alleges that the defendant is about to commit an irreparable injury to the complainant's property, a court of equity will enjoin the commission of such a wrong. The court is in no way concerned with the question whether the defendant is "specially charged" with any duty to do the wrongful act. It is in no sense a question of duty. It is simply a question of whether the probability of the irreparable injury is so strong as to justify the intervention of a court of equity.

If this defendant happens to be a State officer and if the wrong to be done happens to be the execution of an unconstitutional, and therefore void, statute, the situation is not changed. It is immaterial to the court of equity whether the officer is "specially charged" with the duty of enforcing

the unconstitutional statute or not. Indeed, in no proper sense can any officer be charged with any duty to enforce any unconstitutional statute. The question for the court is whether the officer has such a connection in fact with the enforcement of the statute as to justify a suit against him personally. If the officer claims that the statute is constitutional and there is any duty, special or general, upon him to enforce statutes of that character, such a condition furnishes strong presumptive evidence that the officer is about to enforce the statute, and hence tends to remove all question as to the personal connection of the officer sued with the enforcement of the statute in question, and it is for this reason alone that the question whether the officer is charged with the duty of enforcing the statute may be material. Herein, as above pointed out, is the distinction between *Fitts v. McGhee* and the present Rate suit. The Governor and Attorney General of Alabama had no actual connection with the enforcement of the bridge statute, and there was no law of the State of Alabama which imposed upon either of them any duty which could give rise to any presumption that in the carrying out of that duty they would take any steps to enforce that statute or to become personally connected in any way whatever with the subject.

In none of the long line of cases, where the doctrine of *Osborn v. Bank of the United States,* has been applied could a State officer sued have defended successfully upon the assertion, "I admit that I am about to enforce an unconstitutional statute to the destruction of the rights of the plaintiff, but I cannot be restrained from doing so because I am not specially charged with the enforcement of that statute." There can be no such qualification of the settled doctrine that "an officer of a State may be enjoined from executing a statute of a State which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainant." Otherwise the State legislature, to evade successfully the Constitu-

tion of the United States, needs only to embody its unconstitutional legislation in one statute and to embody the duty of enforcement in a separate statute, or to refrain from establishing any express duty of enforcement, leaving such enforcement to the action of the State officers in the exercise of their general powers.

Moreover, if such irrational qualification of the established doctrine on this subject be adopted, it then follows that the cases of *Smyth v. Ames* and *Prout v. Starr* were incorrectly decided, because the statute complained of in those cases imposed no duty with respect to its enforcement upon either the Board of Transportation or the Attorney General, and the only duty in regard thereto imposed upon the Board of Transportation was by virtue of the most general language in a much earlier statute merely giving the board "general supervision" over the railroads of the State, and the only duty in regard thereto imposed upon the Attorney General was by virtue of general statutory provisions giving him discretionary authority to appear for the State and making it his duty to consult with and advise the prosecuting attorneys in matters pertaining to the duties of their office.

Any assumption that the distinction between *Reagan v. Trust Company, Smyth v. Ames*, and *Prout v. Starr*, on the one hand, and *Fitts v. McGhee*, on the other, lies in the fact that the officers in the latter case could not be enjoined, because the only way in which they could enforce the statute would be by the institution of judicial proceedings instead of by some specific act which could be regarded as a tort, is wholly unfounded, because the only possible wrong which could have been committed by the officers sued in *Reagan v. Trust Company, Smyth v. Ames*, or *Prout v. Starr* was the institution and conduct of legal proceedings. The language of the Court in *Fitts v. McGhee*, as well as its language in *In re Ayers*, upon the proposition that controlling the institution of judicial proceedings controls the action of the State itself, must be read in the light of the fact that in each of these cases the State was regarded, and properly regarded, as

the real party sued, and it was simply pointed out that, being the real party sued, the issue could not be evaded by saying the process would operate merely upon State officers and not upon the State itself.

Any assumption that the decision in the case of *Fitts v. McGhee* rested upon the idea that the suit must necessarily be regarded as a suit against the State, simply because it was only in the capacity of State officers that the officers sued could injuriously affect the complainant's rights, is likewise wholly at variance with practically every case where a suit against a State officer has been sustained, because in every such case the wrongful acts complained of could be committed by the officer only as the officer of the State. This is strikingly true of *Pennoyer v. McConnaughy, Reagan v. Trust Company, Smyth v. Ames,* and *Prout v. Starr.* The theory underlying all these cases is that, notwithstanding the fact that the action is official, yet the official position does not protect the officer from being personally sued and enjoined where the action he is about to take is for the enforcement of an unconstitutional statute which will so injure the rights of the plaintiff as to entitle him to relief in equity.

We repeat that the vital distinction between the cases of *Reagan v. Trust Company, Smyth v. Ames,* and *Prout v. Starr,* on the one hand, and *Fitts v. McGhee,* on the other, was that in the former three cases the officers sued were "about to commit" the specific wrong of instituting judicial proceedings to enforce an unconstitutional statute, while in *Fitts v. McGhee* the Governor and Attorney General could not by any plausible pretense be regarded as being "about to commit" any such wrong, and therefore, the suit could not be viewed as a suit to prevent them personally from taking such official action to the injury of the complainants.

A distinct branch of the decision in *Fitts v. McGhee* was the decision that the prosecution of indictments in the State courts could not be enjoined under the peculiar circumstances

presented in that case. Those circumstances were that after the suit had been brought indictments were found against one of the bridge tollmen whereby he was charged with the violation, *not of the statute complained of as unconstitutional,* but of a section of the Alabama Code which imposed a penalty for charging more than a reasonable rate, such rate to be fixed by a jury, *and the constitutionality of which section of the Code was not questioned in any way.*

This section 4151 of the Criminal Code of Alabama read as follows:

> "Any person who, being or acting as an officer, agent, servant or employee of any turnpike company, macadamized road company or other incorporated road or bridge company, takes, receives or demands any greater charge or toll for travel or passage over such road or bridge than is authorized by the charter of such company, or if the charter does not specify the amount of toll to be charged or taken, fixes, prescribes, takes, receives or demands any unreasonable charge or toll, to be determined by the jury, must on conviction be fined not more than one hundred dollars."

This section of the Code had not been attacked in the suit and was in no way involved therein, so that the indictments did not in any way relate to the subject-matter covered by the suit. After the State court had acquired complete jurisdiction of this new and distinct subject-matter arising under the indictments for the violation of the Code, the bill was amended so as to show these facts, the prosecuting solicitor was made a party defendant, and an injunction was obtained restraining him from proceeding with these indictments. Under such circumstances this court held that the injunction against the prosecuting attorney was an injunction against criminal proceedings in a State court contrary to section 720 of the Revised Statutes of the United States. This decision was entirely consistent with the decisions in *Reagan v. Trust Company, Smyth v. Ames,* and *Prout v.*

Starr, that in a suit in equity against appropriate defendants the court, to protect the subject-matter thereby brought within its jurisdiction, may enjoin the institution or conduct of all proceedings, either civil or criminal, which might otherwise be brought *thereafter* in the State courts.

The discussion in *Fitts v. McGhee* of the injunction, as restraining the prosecuting solicitor from prosecuting the indictments, was based upon the doctrine stated by the court in *In re Sawyer,* 124 U. S., 200 (which was a case not involving property rights), that in general a court of equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings because the jurisdiction of a court of equity is limited to the protection of property rights.

This court, however, has clearly recognized that where property rights are involved a court of equity may enjoin the institution and prosecution of criminal proceedings.

In *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S., 207, 218, the court said:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

In Dobbins *v.* Los Angeles, 195 U. S., 223, 241, the court said:

> "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity. Davis & Farnum Mfg. Co., *vs.* Los Angeles, 189 U. S. 207, 218, and cases therein cited."

In *Fitts v. McGhee* the court also referred to the fact that two tollgate-keepers who had been indicted for violation of section 4151 of the Criminal Code had been released upon

writs of *habeas corpus*, and that thereby the court had interfered with their trial in the State court. This court held that this action was erroneous, because "the Circuit Court, sitting in equity, was without jurisdiction to prohibit the institution or prosecution of those criminal proceedings in the State court." Of course, therefore, the decision on this point has no bearing in a case where the order of injunction is within the jurisdiction of the court.

6. THE CONTENTIONS OF OPPOSING COUNSEL, IF ADOPTED, WOULD DESTROY THE JURISDICTION OF THE FEDERAL COURTS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND DESTROY THE OPERATION OF THE FOURTEENTH AMENDMENT.

In order adequately to appreciate the effect of the contentions of opposing counsel, it is proper to set forth with some detail the expressions of this court as to the jurisdiction of the courts of the United States with respect to controversies of this character.

(*a*) *The question whether a legislative enactment fixing rates affords just compensation is a question for judicial determination.*

In *Chicago, etc., Company v. Minnesota*, 134 U. S., 418, 458, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and

effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital the company is deprived of the equal protection of the laws."

In *Reagan v. Farmers' Loan & Trust Company*, 154 U. S., 362, 397, 399, the court said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation" * * * (p. 397).

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates

to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property" (p. 399).

In *Smyth v. Ames*, 169 U. S., 466, 526, 527, the court said:

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry" (526).

"But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding (Art. VI). The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary

distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land" (527).

In *Chicago, Milwaukee, etc., R'y, v. Tompkins,* 176 U. S., 167, 172, the court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'
>
> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

(*b*) *This question is essentially civil in its character and has always been so treated.*

The only parties, other than the carrier, who are pecuniarily interested in the questions are the shippers and passengers.

In *Reagan v. Farmers' Loan and Trust Company,* 154 U. S., 362, 390, the court, dealing with the question as to what parties were substantially interested in the controversy as to the validity of the rates attacked, said:

> "Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property" (page 390).

In *Missouri, etc., Railway Company v. Missouri Railroad, etc., Commissioners,* 183 U. S., 53, the Railroad Commission of Missouri brought suit against the railway company in a State court to enforce an order of the Commission requiring the discontinuance of certain rates held to be excessive. The railway company, on the ground of diverse citizenship, sought to remove the case to the Circuit Court of the United States. Such removal was denied by the State court upon the ground that the real party plaintiff was the State of Missouri, and therefore a removal was not authorized because the State was not a citizen within the meaning of the "removal acts." The case was brought to this court upon writ of error, and the judgment of the State court was reversed upon the ground that the removal should have been allowed because the State was not the real party plaintiff. The court said:

> "It is not an action to recover any money for the State. Its results will not enure to the benefit of the

> State as a State in any degree. It is a suit to compel compliance with an order of the Railroad Commissioners in respect to rates and charges. The parties interested are the railway company on the one hand and they who use the bridge on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the Commissioners. They are the real parties in interest, and in respect to whom the decrees will effectively operate" (p. 59).

In *Chicago, etc., Co. v. Tompkins*, 176 U. S., 167, 173, the court, in pointing out the right of the company to a judicial consideration of this subject, used this illustration:

> "It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

Clearly a controversy involving exclusively the question of just compensation for property devoted to a public use must be essentially a controversy of a civil nature, and if it be presented in the form of a civil controversy and the jurisdictional amount be sufficient the subject comes within the judicial power of the United States as defined by the Constitution and laws of the United States.

(c) A suit in equity is a proper form of suit for the determination of this question.

The propriety of a suit in equity for this purpose was pointed out by Mr. Justice Miller in his concurring opinion in *Chicago, etc., Railway Company v. Minnesota,* 134 U. S., 418, as follows:

> "6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.
>
> "7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method" (p. 460).

The jurisdiction of a court of equity with respect to this question has been recognized in a great many cases, and the practical necessity for resort to such jurisdiction has been emphatically pointed out in the following, among other, cases: *Smyth v. Ames,* 169 U. S., 466, 517; *Detroit v. Detroit Citizens' Street Railway Company,* 184 U. S., 368, and *Cleveland v. Cleveland Street Railway Company,* 194 U. S., 517.

In addition to the complex character of the questions involved with which the machinery of a court of law cannot adequately deal and in addition to the multiplicity of ac-

tions, prosecutions, and controversies which can only be avoided by a comprehensive proceeding in equity a further important reason for resort to a court of equity in such cases is the practical and indeed legal necessity for uniformity in the rates of railroad companies. One of the most important principles of public policy underlying the regulation of railroad rates is the principle that the same rates shall be charged to all persons under similar circumstances. If the validity of a statutory schedule of rates is to be questioned, the only method in which that question can be tested so as to conserve this important principle of public policy is to have the question heard and determined in some proceeding which will be binding upon all parties interested in the rates and which will insure uniformity of action with respect to all persons.

(d) A Circuit Court of the United States sitting in equity is an appropriate tribunal to determine this question.

In *Reagan v. Farmers' Loan and Trust Company*, 154 U. S., 362, 391, the court said:

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts" (391).

In *Smyth v. Ames*, 169 U. S., 466, 516, the courts, responding to the suggestion that the remedy in the State courts prescribed by the Nebraska act was exclusive, said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the circuit courts of the United States (citing authorities). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction" (p. 516).

The passenger-rate statute provides that any railroad company violating any provision of the act shall be liable to a penalty of $500 for each violation, payable to the person aggrieved by such violation and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof.

Section 2 of the freight-rate statute provides that "any railroad company doing business in the State of North Carolina which shall make charges for shipments of freight in violation of the provisions of the act shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than $100."

The operation upon the railroad company of the penal provisions of these statutes would make possible the imposition of fines which in a very short time would far exceed the total value of the railway company's property in the State of North Carolina, and in a short time would exceed the total value of the railway company's property in all the States in which its lines are located. The expense incident to defending all these prosecutions would itself soon equal the value of the property of the company. Under such circumstances it is clear that the power of the company to perform its duty as an interstate carrier and as a carrier of the United States mails would be greatly imperiled if, without resorting to a court of equity for protection, the company, believing the statutes to be unconstitutional, should decline to obey them. The result would be that the company's ability to continue its service to the Government of the United States and in interstate transportation would depend upon the chance whether the statutes would eventually be declared to be unconstitutional, or, if found constitutional, would depend upon the generosity or conservatism of the individual citizens of North Carolina and the prosecuting officers and executive of that State.

The passenger-rate statute also provides that "any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court." The freight-rate statute provides that "any officer or agent of a railroad company who shall make charges for shipments of freight in violation of the provisions of the act shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

Therefore, if the railroad company had no opporunity to go into a court of equity to obtain protection, and, believing these statutes to be unconstitutional, were to decline to observe them, the result would be a partial paralysis, and perhaps a complete paralysis, of the whole transportation

service of the railroad company, including its transportation of the United States mails and its transportation of interstate passengers and property. When we recall the emphatic position taken by this court in the case of *In re Debs*, 158 U. S., 564, to the effect that the powers of the circuit courts of the United States, as courts of equity, may be exercised to prevent any obstruction of the United States mails or of the channels of interstate commerce, it seems peculiarly appropriate that the circuit courts of the United States should be appealed to in cases like this, to the end that there may be an orderly determination of the rights of the persons interested in the railroad companies affected by the statute.

(e) Any device of a State statute which would prevent the determination of such a controversy by the Federal courts of equity would be inconsistent with the supremacy of the judicial power of the United States.

It being established that a suit against officers of a State to prevent the execution of an unconstitutional statute is not a suit against the State, and that in a proper case for the protection of property rights a court of equity can enjoin criminal proceedings, we submit that this case has only two remaining aspects: First, shall the judicial power of the United States be supreme? and, second, Is there any adequate remedy for invasions of the property rights of persons by prosecutions contrary to the Constitution of the United States?

The second paragraph of Article VI of the Constitution of the United States reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Section 1 of Article III of the Constitution of the United States provides in part:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of Article III of the Constitution of the United States provides, among other things, that—

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," * * *

Section 608, Revised Statutes, establishes circuit courts of the United States.

Section 1, ch. 866, of 25 U. S. Statutes at Large, p. 434, provides:

> "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States," etc.

We have here a controversy of the very greatest importance to property rights, a controversy which is essentially civil in character, a controversy which demands the exercise of the jurisdiction of a court of equity, a controversy which it is especially important shall be passed upon by the courts of the United States, on account of the intimate connection between the enforcement of statutes of this character and the interstate transportation service of this country, and also the carriage of the United States mails. The question is whether State legislatures may take away a part of the judicial power which the Constitution and laws of the United States have conferred upon the circuit courts of the United States. According to the contentions of opposing counsel,

the judicial power of the United States is subject to encroachment of this character whenever State legislatures determine what shall be the compensation for property devoted to a public use and provide for the enforcement of their determination by criminal proceedings, omitting to make it the exclusive or specific duty of some particular officer of the State to see to the enforcement of such legislative provisions. We deny that the judicial power of the United States is thus subject to repeal *pro tanto* by State legislatures.

> *(f) Such impairment of the judicial power of the United States would modify the effect of, and in cases like this would practically destroy, the Federal limitations upon the powers of the States.*

Not only do the contentions of opposing counsel result in the proposition that State legislatures have the power to repeal *pro tanto* the judicial power of the United States, but in the further proposition that the State legislatures have a practical and substantial power to repeal all other provisions of the Constitution of the United States which amount to a limitation upon the powers of the States.

The Federal judiciary was created to enforce the Constitution and laws of the United States. It is the judgment of Congress that to secure the adequate enforcement of the Constitution and laws of the United States, it is advisable that provision be made for the trial in the first instance in the Federal courts of suits of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, and arising under the Constitution or laws of the United States.

To the extent that the Federal legislation designed to effectuate this view is defeated by State legislation, it follows that State legislation can defeat the adequate enforcement of the Constitution and laws of the United States, and in many cases, of which the present Rate suit is a striking example, such State legislation could effectually destroy the

rights guaranteed by the Constitution of the United States.

As has been so forcibly pointed out by this court in *Smyth v. Ames* and in other cases, there can be no adequate protection of constitutional rights in cases like this except in courts of equity. If State legislatures can devise methods by which the judicial power of the United States courts as courts of equity can be ousted and they can be prevented from determining these questions which are essentially civil in their nature, the result is that the property affected is without any adequate remedy anywhere. The multiplicity of suits and prosecutions would of itself deter the corporation from asserting its rights under the Constitution of the United States. A corporation whose business it is to serve the public by operating a railroad cannot, in order to protect a right existing by virtue of the Constitution of the United States, litigate separately the same question with every individual in the State who may by the ingenuity of State legislation be given a separate cause of action with respect to the subject of controversy. Moreover, the penalties imposed constitute an insurmountable barrier to any assertion of constitutional rights if the corporation is excluded from a comprehensive proceeding in equity.

Again, the imposition of fines and imprisonment upon the agents of the corporation is calculated so to terrorize and demoralize those agents as to coerce them either into complying with unconstitutional statutes or into leaving the service of the company and paralyzing its transportation service.

In conclusion, it seems appropriate to refer to the language of this court by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat., 738. The court, after stating the argument of appellants that the suit was against the State of Ohio, and therefore the Circuit Court could not exercise jurisdiction, said:

> "Before we try this question by the Constitution, it may not be time misapplied, if we pause for a moment,

and reflect on the relative situation of the Union with its members, should the objection prevail.

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the

bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

"The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

"The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws" (pp. 846-849).

If it be held that circuit courts of the United States have no jurisdiction to restrain the enforcement of statutes like the passenger-rate statute, when in conflict with the Constitution of the United States, then the inability of Ohio to tax the Bank of the United States was merely due to lack of ingenuity on the part of the Ohio legislature. The legislature instead of providing for the seizure of the money of the bank should have provided for a vast number of judicial proceedings, for enormous penalties, and for criminal prosecutions against all the employees of the bank. The bank would have been unable to restrain the enforcement of the statute, and no doubt, to avoid the risk of the penalties, the expense of the litigations, the demoralization of its entire force through fear of imprisonment, the bank would have paid the tax or have withdrawn from business in the State.

II.

ORDER OF DISCHARGE PROPER BECAUSE WOOD WAS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Wood had charged more than 2¼ cents per mile for a passenger ticket, and therefore was held by the police justice to have violated section 1 of the passenger-rate statute, and hence to be guilty of a misdemeanor. In pursuance of section 4 of the statute, the police justice sentenced Wood to the chain gang for thirty days. Hence Wood was in the custody of the sheriff of Buncombe County because of the imposition upon him of the penalty prescribed by section 4 of the passenger-rate statute.

We contend that if the proceeding in equity in the Federal court was unavailing to prevent the imposition of the penalty, then the penal provisions of the statute were in conflict with the Constitution of the United States, and that the circumstances were so extraordinary as to justify Wood's release by a writ of *habeas corpus*.

1. Unless the Federal court had jurisdiction of the rate suit and could prevent the imposition of penalties for acts under the order of the court, then the penal provisions of the passenger-rate statute are contrary to the Constitution of the United States.

(a) *The statute was simply a method of fixing reasonable compensation for a legitimate use of property.*

It must constantly be borne in mind that the passenger-rate statute was not a statute to prohibit a use of property deemed by the legislature to be injurious to the public wel-

fare. The statute was simply a convenient method for fixing reasonable compensation for a legitimate and necessary use of property devoted to a quasi-public service. A remedy in the courts existed at common law for the exaction of any unreasonable compensation for such service; but, such remedy being inconvenient and inadequate, the statute was simply an additional step in securing in a convenient way the establishment of a reasonable and uniform rate of compensation for a legitimate use of property. The subject with which the statute dealt was essentially a subject of a civil character and was in no sense a subject of a criminal character. The mere fact that the legislature chose to provide for the enforcement of the statute by criminal proceedings did not change the essential nature of the subject-matter of the regulation.

> (*b*) *The question whether the compensation so fixed is reasonable is a question for judicial determination.*

While at this day this proposition needs no citation of authority, yet it seems appropriate to set forth in this connection the language of this court:

In *Chicago, etc., Company v. Minnesota,* 134 U. S., 418, 458, the court said:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.

In *Reagan v. Farmers' Loan & Trust Company,* 154 U. S., 362, 397, 399, the court said:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is

a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practicable destruction to rights of property, and, if found so to be, to restrain its operation" * * * (page 397).

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property" (p. 399).

In *Smyth v. Ames*, 169 U. S., 466, 526, the court said:

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the

> legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry" (526).

In *Chicago, Milwaukee, etc., Ry. v. Tompkins*, 176 U. S., 167, 172, the court said:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

> (c) *If the Rate suit was not an appropriate and effective method of obtaining this judicial determination, then no method whatever was possible except to disobey the statute and test the unreasonableness of the compensation fixed in all proceedings, civil and criminal, seeking to enforce the statute.*

The Rate Suit was brought for the determination of the question whether the statutory rate afforded just compensation for the use of the railway property. This is a question which the railway company had the right to have determined by the courts. The suit was instituted by filing a bill in equity, which is the method repeatedly approved by this court. The suit was brought against the members of the Corporation Commission, the body having general supervision and control of the subject matter of the statute and charged with the enforcement of the statute and against the Attorney General, who by statute is declared to be the attorney of the

Corporation Commission and whose duty it was to act in accordance with the Commissioner's request. We believe we have demonstrated that these defendants were proper defendants to the proceeding. We have further especially pointed out that every reason existing in the cases of *Smyth v. Ames* and *Prout v. Starr* to justify the propriety of those suits against the Board of Transportation and Attorney General of Nebraska applies with stronger force to sustain the propriety of the present Rate Suit against the Corporation Commission and the Attorney General of North Carolina.

We have also pointed out that there has never been a rate case where all the parties in interest were before the court, and that generally the real parties in interest, to wit, the shippers and passengers, have never personally been before the court at all.

It would, of course, have been impossible to bring before the court all the individuals interested in the enforcement of the rates prescribed by the statute, and this has been equally true with respect to every rate case which has ever been instituted.

No other individual or set of individuals could have been selected who would have been more appropriate as defendants to the proceeding than the defendants selected here. If, then, this proceeding was not an appropriate one to bring before the court, the essentially judicial question as to whether the compensation prescribed for the use of the company's property was reasonable, it was impossible to bring any proceeding which could have accomplished that purpose.

We come, therefore, to the proposition that unless the Circuit Court of the United States for the Eastern District of North Carolina could take jurisdiction of the Rate Suit, and therein could determine the judicial question involved, and could protect and enforce its jurisdiction by preventing any interference with the corporation or with its officers or agents for doing those acts which in the judgment of the court were proper pending the final determination of the

case, then there was no possible proceeding wherein the company could have the judicial determination to which it is entitled, of the essentially judicial question involved as to the reasonableness of the statutory compensation for the legitimate use of property, except by treating the statute as a nullity, declining to obey it and attempting to demonstrate the unconstitutionality of the statute in all proceedings brought against the corporation and against its officers and agents on account of such failure to comply with the statute. This being true, we contend that all the penal provisions of the statute are necessarily unconstitutional, because the effect of those provisions is to burden to an unreasonable extent, and indeed to destroy, the constitutional right of the railroad company to a judicial determination of the question involved.

> (*d*) *If a judicial determination can be had only by disobeying the statute, it is unconstitutional to burden judicial review by the imposition for such disobedience of the penalties prescribed in the passenger-rate statute.*

The passenger-rate statute provides that any agent, servant, or employee of any railroad company violating the act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. The railroad company can act only through its agents, servants, and employees. The company, for the purpose of obtaining a judicial determination of the unreasonableness of the compensation prescribed by the statute, must disregard or violate the statute through some agent and not otherwise. It will be necessary for some ticket agent to sell a ticket at a higher rate than the rate prescribed by the statute, or for some conductor to collect upon the train a higher rate than that prescribed by the statute. Therefore for the railroad company to get the judicial review to which

it is entitled it is an indispensable preliminary step that it shall be able to induce its agents to disregard the statute.

Yet the statute declares to every agent, servant, and employee of the company that his violation of the statute subjects him to the charge of having committed a crime and to the risk of punishment by either fine or imprisonment, or both, in the unlimited discretion of the court. The statute denounces as a criminal every agent of the railroad company who participates in the step which is absolutely necessary as a preliminary to any judicial inquiry and threatens him with punishment of the most degrading character.

This feature of the statute itself amounts to an unconstitutional burden upon the railroad companies' right of a judicial review. If the Constitution of the United States gives to the railroad company the right to question in court the reasonableness of the compensation prescribed by the statute, then it is a defiance of that right and a manifest burden upon the exercise of that right for the statute to declare that any agent of the company who takes the step necessary to obtain that judicial review shall be regarded and treated as a criminal. It is easy to conceive that the demoralizing effect of such a denunciation may be such as of itself utterly to deprive the railroad company of any opportunity to question in court the reasonableness of the compensation prescribed by the statute.

In addition to the burden which grows out of the statute denouncing as a crime every one who participates in the steps necessary to the assertion of the right guaranteed by the Constitution of the United States the statutory penalties impose a further and an absolutely prohibitive burden upon the assertion of the constitutional right.

If the corporation can induce its agents, notwithstanding the denunciation of the statute, to disregard the statutory rate, and proceedings are brought in accordance with the declared purpose of the statute against the agents for such crime and by individuals against the corporation for the

money penalties, the result is that the agents must demonstrate the unreasonableness of the statutory rate or be fined or imprisoned, or both, in the discretion of the court, and the corporation must demonstrate the unreasonableness of the statutory rate or be subject to the penalties recoverable by individuals.

In other words, the State says:

> "I do not deny your right to a remedy under the Constitution of the United States, but if you presume to resort to that remedy and are unsuccessful I shall visit upon you as a penalty for your resort to that remedy a liability and forfeiture which will exceed a thousandfold the amount involved in the controversy and will impose upon the agents who have been criminal enough to co-operate with you in this purpose, penalties which in the discretion of the court may result in their degradation and imprisonment for life or the confiscation of all their property, or both."

We submit that any such scheme is a denial of the equal protection of the laws, contrary to the Fourteenth Amendment. No other person and no other corporation is subjected to any similar consequences for the assertion of a constitutional right of going into court. A more monstrous discrimination could not be imagined.

The practical result of this scheme is to coerce the corporation into observing the statutory rate, no matter how unconstitutional that rate may be. No other practical course is open. The corporation must comply with the rate as a less evil than the evil of taking the chance of the consequences of asserting its right in court. Therefore the necessary effect of the statute and its evident purpose is to deprive the company of its property without due process of law, because it compels the company to give its property to the public at a rate prescribed by the statute, and by the penal provisions intimidates the company from resorting to the only course which will admit of due process of law.

The only views with which we are familiar which have been expressed by the Federal judiciary with respect to such penalties are as follows:

In *Mercantile Trust Company v. Texas and Pacific R. Co.*, 51 Fed. Rep., 529, the Circuit Court of the United States held, in effect, that section 5 of the Texas act, which provided that the rates fixed by the Railroad Commission should be conclusive until finally declared to be otherwise, was unconstitutional, and with reference to the other provisions of the act (including those providing heavy penalties for disobedience of the rates prescribed by the Commission) said:

> "It clearly appears to me that every provision of this law that tends to thus enforce a compliance with the rates of the Commission, whether they be reasonable or not, and every provision tending to embarrass or enabling the Commissioners to embarrass such roads as may choose to invoke the protection of the Constitution against the taking of their property without the due process of law, or denying them the equal protection of the law, is affected with the same vice that renders section 5 invalid" (p. 543).

Upon appeal this court held it was unnecessary to pass upon the constitutionality of the penalties, because the section prescribing penalties might be dropped from the statute without affecting the validity of the remaining portions, and that for the purposes of the case before the court it might be conceded that the question was unconstitutional.

Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362, 394.

In *Louisville & Nashville R. Co. v. McChord*, 103 Fed. Rep., 216, 224, the court said:

> "If it had been the intention of the legislature to recognize the right to a judicial investiga on of

> the reasonableness of the rates fixed under the provisions of the act, and to afford an opportunity therefor before a conviction upon an indictment for extortion, it would have said so in unmistakable terms in order that the accused might not be left to the doubtful chances of mere construction, not only as to the existence of that right, but as to the competency of a criminal court in a criminal case, without a Commissioner or adequate equipment to enforce it. It is indeed manifest from the entire scope and plan of the enactment, and its operation upon mere isolated cases only, that it was the purpose to exclude all inquiry upon that subject after the Commission had acted, and to enforce by rigorous and extravagant penalties the rates thus fixed, however reasonably and earnestly the railroad might desire to promptly have the question of the justness of those rates finally determined by a judicial inquiry. Upon the principles so often and so emphatically announced by the Supreme Court, this purpose thus plainly written in the legislation must be fatal to its validity."

This case also was appealed to this court, and the question presented for its consideration was whether the statute was void by reason of its penal provisions, but the court held that, as no rates had been fixed, the court had no jurisdiction to entertain a suit, and added:

> "We are not called on to dispose of other contentions of grave importance which were pressed in argument, as if now requiring adjudication."
>
> *McChord v. Louisville, etc. R. Co.*, 183 U. S., 483, 502.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79, Mr. Justice Brewer pointed out some of the grave constitutional objections to penalties of this character (pp. 100, 101, 102,) and said:

> "In this feature of the case we are brought face to face with a question which legislation of other States is presenting. Do the laws secure to an indi-

> vidual an equal protection when he is allowed to come into court and make his claim or defense, subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss? * * * Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? * * * It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations, and if extremes and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In *Consolidated Gas Co. v. Mayer*, 146 Fed. Rep., 150, 154, the court said:

> "Long before this test suit could be heard next fall, the aggregate of the penalties incurred would utterly wipe out the entire property of the complainant, whether it were worth the amount found by the gas commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it."

The court then quoted a portion of the language just quoted from Mr. Justice Brewer's opinion in the Cotting case, and added:

> "In the case cited the judges who concurred in reversing the judgment appealed from did so upon another ground, but the language of Mr. Justice Brewer, dictum though it be, commends itself as a clear and forceful exposition of the law.
>
> "It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City Stock Yards case, except that they are perhaps more drastic. On this branch of the case there is no controversy as to the facts, and under the opinion last quoted, these provisions seem obnoxious to the Fourteenth Amendment to the Constitution of the United States. In order, therefore, to secure to the complainant its right to prosecute this suit to its orderly conclusion, without meanwhile being trammeled—or, as it may be more appropriately expressed, overwhelmed—by multitudinous actions for cumulative penalties, the temporary injunction which restrains the public officers, who are made defendants, and any one else whom the injunction may reach and hold, from enforcing, or attempting to enforce, the provisions of the acts and order of the gas commission against the complainant, will be continued until final hearing and decision of the cause in this court."

The court below in the present case held that these penal provisions of the statute were unconstitutional. The court said:

> "In the case of *Railroad Company v. Minn.*, 134 U. S., 456; 10 Sup. Ct., 702; 33 L. Ed., 970, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive, and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that State, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial

investigation into the validity of the rates. If this cannot be accomplished directly, it cannot be done indirectly. It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore any system of penalties which is intended to have the effect, and which is so framed as to have the effect, of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section 4 of the act in qustion clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the courts, no matter how *bona fide* this bill is made, such enormous fines and penalties in favor of individuals as to burden the challenger of the act in the courts, so as to make it, if the penalties were valid, practically impossible for such an appeal to be made" (pp. 196, 197).

The court then quoted from the language of Mr. Justice Brewer in the Cotting case and added:

"The evidence shows that one case under this provision of the act has already been tried in the superior court of Wade County against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of $30,000 against the company, and notified the agent that, if he would stop selling tickets at a price that was authorized by the decree of this court, the judge would impose a nominal punishment, but, if he did not, the court would not say what it would do until it had received an answer. In making this reference the court does not wish to be understood as criticising the State court, for there is no one in the State for whom the court entertains a higher regard than Judge Long. It is also shown by the uncontradicted evidence in this case that at least 5,000 tickets are sold daily by complainant at its various offices in the State, in its intrastate business, thereby making it possible for it to be sued 5,000 times in one day for penalties amounting to $500 in each instance on account of its failure to comply with the statute fixing passenger rates. Thus it will be seen that by an en-

forcement of the statute judgments can be obtained against the complainant for the sum of $2,500,000 for each day. The aggregate penalties for which judgment could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit would be for one year.

"This system of legislation is also condemned by Judge Lacombe, in the case of *Consolidated Gas Co. v. Mayer* (C. C.), 146 Fed., 150, and the conclusion is irresistible, from what this distinguished jurist has to say, that such a system of penalties is unconstitutional and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights."

"The court, therefore, is of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon its face (p. 198).

In *Perkins v. Northern Pacific Ry. Co.*, 155 Fed. Rep., 445, 449, the court said:

"And it seems to me, in view of the severe penalties denounced by these acts of the legislature, that the officers of the corporations could not have done otherwise than to have refused to act under those circumstances, where their action would have laid them liable to severe penalties; and every subordinate, who under their direction should attempt to violate these provisions, being also liable to like penalties, would also refuse. There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind. In case of the refusal to issue a ticket at a certain rate which is fixed by the legislature as proper, but which the railroad companies hold to be void and unconstitutional (and which would be an act of itself not immoral nor

malum in se, but would ordinarily afford the person who was refused the privilege of a ticket a right of action against the railroad company), in case he was in the right and the refusal was wrong, there would be no question but that in a civil action any such person would receive an adequate remedy; there would be no danger that any court or jury would refuse to give ample damages. Beyond question, the result of actions of that kind would be that the damages would almost certainly border on the excessive, instead of failing to remunerate the party for any wrong he would suffer on account of such a refusal. But under the provisions of these laws, acts not immoral or wrong in themselves, but which are only unlawful because prohibited, would entail upon the person refusing to comply with such laws the position of being convicted of a felony. They make the refusal a felony, and impose a punishment very unusual—a fine that might be to the amount of $5,000, or imprisonment in the state prison to the extent of five years, or both, in the discretion of the court; punishments which are applied only to the very highest crimes short of homicide of which men are ever guilty; punishments which would be deemed adequate in cases of burglary, highway robbery, or crimes of the highest character, short, as I say, of homicide. There is no doubt that the directors and officers of railroad companies were entirely justified in refusing to take the hazard that would fall upon them (and their employés, if they acted under their advice) by taking any steps to save the stockholders from the consequences of these laws."

(c) Even if the intimidation of the penalties were eliminated, it would be unconstitutional to restrict to a defense in such an action the assertion of the property right involved.

We shall now show that, even if the railroad company and its agents were not precluded by the menace of the penalties from taking the steps necessary to make possible

a judicial proceeding in which the defense could be made that the statute is unconstitutional, no substantial judicial review in such judicial proceeding would be practicable.

(1) Company's right to judicial review would depend on grace of the opposition.

The assumption that there could be a judicial review by way of defense to an action for violation of the statute seems to proceed upon the idea that a test case would be made in which the constitutionality of the statute could be tried and then, pending final determination of that case, the company should comply with the statute.

Such suggestion involves the difficulty that the company's right to go into court depends upon the grace of officers of the State or of aggrieved passengers. If the company, to make a test case, violates the statute with respect to one or two transactions and then complies with the statute, it would be almost a certainty that the State officers and the persons aggrieved would omit to institute any proceedings against the company, preferring the undisturbed benefit of the subsequent acquiescence of the company in the statute to the inconvenience and possible (though remote) ultimate danger of an adverse decision; consequently in all probability the company must violate the statute a great many times and therefore subject itself and its agents to a vast multiplicity of actions, or it must obtain the coöperation of the State officers or individual passengers, in order that there may be any judicial proceeding at all. As was said in the case of *Bank of Kentucky v. Stone*, 88 Fed. Rep., 390:

> "The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party."

Moreover, any proceeding of this character instituted with the coöperation of a passenger would be destined to meet the fate of the Wellman case, 143 U. S., and the Gill case,

156 U. S. Such cases would be treated as moot cases, not properly and comprehensively presenting the question involved, and hence would not result in any effectual relief.

> (2) To avoid the consequences of continued disobedience the company, at least until final determination, would have to submit to a confiscatory rate.

But even if the necessary coöperation could be secured without being regarded as collusive, the further element is involved that pending the determination of the case the company must observe the statutory rate, no matter how confiscatory that rate may be. Thus it might come about that for several months or probably several years, pending a final determination of the case, the company would be constrained, in order to avoid the expense and vexation of a vast multiplicity of actions, to charge a rate which by degrees would be confiscating the company's property. In other words, the scheme would be one whereby the company for a very substantial period would be subjected to confiscation. The Constitution, however, operates as a continuing protection to property, and it is as obnoxious to the Constitution to confiscate the company's property for one year as it is to confiscate the company's property for ten years.

In *Smyth v. Ames* it was urged that the reduction attempted by the State of Nebraska affected only a small part of the company's total earnings. In response to this argument the court quoted with approval from the opinion of the Circuit Court as follows:

> "The fact that the State of Nebraska can reach only one-twentieth of the total earnings, gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earning" (169 U. S., 543).

(3) Machinery of the court wholly inadequate to try the complex question.

A still further reason why a review of such a question by way of defense to a criminal proceeding against an agent or to an action by an individual for a penalty is that the machinery of the court in such a case is utterly unsuited to dealing with the question involved.

Such a proceeding, whether civil or criminal in form, would be tried by a jury. The questions involved would be principally questions of fact. The ultimate question of reasonableness of the rate would itself be a question of fact and would depend upon decisions upon a great many complicated elements, each of which would be a question of fact. All of these questions of fact would be tried by the jury.

The courts have had frequent occasion to point out the inability of a jury to deal effectively with questions of this character.

In *Louisville and Nashville R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep., 679, the court considered a statute which left the question of the reasonableness of rates to a jury. After pointing out that the act recognized the railroad company's right to a fair return on the value of the railroad as assessed for taxation, the court said:

> "Suppose the value satisfactorily ascertained, how and upon what basis are the net earnings to be computed? Is the estimate to be based upon past receipts, current income or anticipated earnings? Is the accused corporation to be held to anticipate its future operations, foresee the amount of its receipts and expenditures, and accurately foreknow its future profits and losses, so as to be able to strike a balance in advance of actual results in order to make its charges conform to the requirements of the statute? If so, how far in the future must their knowledge extend? These are some of the many difficulties with which railroad companies are to be embarrassed, and

against which the act requires them to provide. But we will suppose these to have been successfully surmounted, and another and more obstinate problem remains. These corporations are, in addition to their expenses, allowed to charge at a rate that will insure a 'fair and just return' on the value of their property. But what is a fair and just return? This vital question is by the act left to the unqualified and unrestrained discretion of the jury. There is no legal standard erected whereby the jury can measure the amount. One jury may fix it at 2 or 3 per cent. per annum, while another jury may, in view of business contingencies and fluctuating values, allow 6, 8 or 10 per cent. and their action would be so far conclusive as to be beyond the revision of any reviewing court. The facts that the jury are to ascertain are, first, the net earnings; and secondly, what would be a 'fair and just return'? The ascertainment of net earnings involves necessarily an inquiry into the gross receipts and expenditures. May the jury revise the expense account, and if so, to what extent? Both the earnings and expenses vary in accordance with the exigencies of business. Are rates to be varied in accordance with the fluctuating fortunes of railroad operations? If so, a charge reasonable in itself and honestly made might be rendered extortionate, and hence criminal, by a reduction of expenses or an unexpected increase of business, or a charge honestly made on the supposition that 5 or 6 per cent. would be fair and just, might be converted into a crime by the verdict of a jury subsequently rendered, based, it may be, upon facts transpiring subsequent to the alleged violation of the law" (p. 692).

In *Winsor Coal Company v. Chicago & A. R. Co.*, 52 Fed. Rep., 716, the court pointed out that the legislature had established maximum rates and had provided for the further fixing of rates by the Railroad Commission, and held that an action could not be maintained for the excess over a just and reasonable rate when the rate charged did not exceed the rate fixed by the statute or by the Commission, and said:

> "What in the judgment of one jury in one locality would be an unreasonable charge might in the opinion of another jury in another locality be quite reasonable. With the known capriciousness of jury verdicts, influenced often by individual peculiarities, mental habits, the quantum and quality of the evidence in the particular case, how would it be possible to carry out the legislative intent to establish and maintain a uniform rate of charges? Would not the diversity of conclusions reached by different juries between different litigants in and of itself bring about discriminations and inequality? Under such a construction of this statute as contended for by plaintiff it is not apparent how any railroad company could safely do business in the State. Its agents could never know when they were safe in any charge by them made. After a schedule of rates has been approved and published, the statute makes it unlawful for the carrier to charge less than the scheduled rate, under the pains and penalties prescribed in the act; and yet, under plaintiff's theory the common carrier might be liable for the penalty of triple damages because it did not charge a lesser rate" (p. 720).

In *Van Patten v. Chicago, &c., Railway Co.*, 81 Fed. Rep., 545, the court held that a shipper could not maintain an action against a carrier for charging an unjust and unreasonable rate when the carrier had charged only the schedule rate published and filed in accordance with the Interstate Commerce Act, and said that if such an action could be maintained,

> "It results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the questions which inhere in the establishment of

a properly proportioned and equalized schedule of transportation rates? Take this case as an example. As already stated the petition contains 23 counts, each count being based upon shipments made from a different point and at each point the shipments were made at many different times within the limits of from one to five years. Now the theory of the plaintiff is that the jury must inquire into and determine what the reasonable rate was for each shipment when made, and by comparing the reasonable rate thus fixed by the jury with that actually charged, determine whether the plaintiff is entitled to damages, and if so to ascertain the amount on each shipment made. It is self-apparent that no matter how intelligent the jury might be nor how conscientiously and carefully they might endeavor to deal with the problems thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances. But suppose the case involved but a single shipment, would the difficulty be remedied if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard already recognized and established is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges and the proper proportionate share which the particular shipment should bear" (p. 551).

The decision in *Smyth v. Ames*, 169 U. S., 466, clearly shows the extremely complex character of the questions involved in the determination of such a subject.

In *Chicago, &c., Co. v. Tompkins,* 176 U. S., 167, this court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable" (p. 172).
>
> "We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth v. Ames, supra,* a similar case, he, as circuit judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests" (p. 179).

It is unreasonable to expect any jury to be qualified to deal with questions of such complexity and difficulty or to assume that the machinery of any criminal court is adapted to the trial of such issues.

In *Bronson v. Kinzie,* 1 How., 311, this court considered whether a State law passed subsequently to the execution of a mortgage, relating to the remedy for enforcing the mort-

gage, amounted to an impairment of the obligation of the mortgage. The court said (p. 317):

> "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void and one which took away all remedy to enforce them or encumbered it with conditions that rendered it useless or impracticable to pursue it." * * *

In speaking further of the function of the remedy the court said:

> "It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right without any practical operation upon the business of life."

The proposition that the company has an adequate remedy to test the constitutionality of this statute by submitting the question to a jury reduces the supposed right of the company under the Fourteenth Amendment to a "mere barren and abstract right without any practical operation upon the business of life."

(4) Such a trial could have no element of finality, even as to the past.

Even if the company and its agents were not deterred by the menace of these penalties from going into court; even if it could make a test case by the grace of the adverse parties; even if pending that particular judicial proceeding it was not forced to comply with the confiscatory rate; even if that judicial proceeding had appropriate machinery to give an adequate hearing; still the remedy would not be valuable because in the nature of things it would have about it no element of conclusiveness either as to the past or as to the future.

Even as to the past each transaction would stand upon its own merits, and the determination as to the validity of the statute would depend upon the conclusion of the jury in the particular case. There are countless elements in every question of this sort about which juries may disagree. The values of hundreds of pieces of property are involved; the character of thousands of elements of operating expenditures is involved; a countless number of incidents in the history of the capitalization and management of the company is involved; there is the widest possible range for disagreement as to the cost of performing the service; the fair rate of return upon the property; the question as to what part of the expense shall be borne by each class of traffic. Under such circumstances there would be no possible reason for assuming that the verdict of one jury would be the same as the verdict of another jury. Because one jury might hold the rate unconstitutional would be a practical discouragement to any other person desiring to insist that the rate is constitutional.

(5) Such trial would be even more inconclusive as to the future.

A statute prescribing rates operates upon the future, and it is the future operation of the statute which concerns the railroad company. The future operation of that statute must depend upon the court's best judgment as to the future effect of that statute upon the property of the railroad company. No judicial remedy can be of value to the company unless it can afford protection for the future.

A jury trial is confined to the situation as it existed at the time of the institution of the action. It cannot be conclusive as to a state of facts which may arise in the future. It may be a year or two years or longer between the institution of the action which is to serve as the test of the proceeding and the authority of decision of that action by the court of last resort. Even if the verdict of the jury should be to the effect that the statute is unconstitutional and the judgment upon this verdict should be affirmed by the court of last resort, still it would be open to every individual and to every State officer to contend that that verdict, even if it were conclusive as to all cases arising up to the time of the finding of the verdict, was not conclusive with respect to conditions existing at the time of the affirmance of the judgment rendered upon that verdict.

As was pointed out in *Smyth v. Ames*, rates confiscatory at one time might not be confiscatory at another; and every person having any interest, either official or private, to attack the railroad company for its disobedience of the statute would be justified in invoking this proposition as a reason for denying any conclusive effect of the verdict as to the future.

(6) The restriction of an owner of property to such a remedy would be a denial of the equal protection of the laws.

The controversy presented in any judicial review of a statute of this character is the question whether the rate proposed is a just compensation for a legitimate and necessary use of property which, though devoted to public service, is owned by private persons. If the owners of that property are entitled to any remedy in the premises, they are entitled to an adequate remedy, and to a remedy which is relatively adequate as compared with the remedies available to the other owners of property to protect them in their enjoyment of it.

The question of the value of the use of property is a question not confined to quasi-public corporations. It is a question concerning which every owner of property may find it necessary to resort to the courts. We do not find in the State of North Carolina any restriction whatever upon the right of any owner of private property to resort to a court of equity for a comprehensive determination of his rights with respect to property, and a restriction of his remedies absolutely to actions in courts of law under circumstances where only a court of equity can give an adequate remedy. While there are, of course, numerous grounds for classification whereby quasi-public service corporations may be subjected to different rules from those prescribed for the owners of private property, there is no valid basis for a denial to the owners of property devoted to public use of any adequate remedy whatever.

Nor do we find in North Carolina that the owners of any property devoted to a public service, other than railroad property, are restricted in their remedies with respect to just compensation for the use of their property to actions at law, where the circumstances are such that only a court of equity can give adequate relief. Apparently railroad companies alone have been singled out and discriminated against in this

respect, and a subject-matter imperatively demanding the consideration of a court of equity is sought to be confined exclusively to the determination of courts of law.

We submit that even if the menace of the penalties were not involved in the passage of the rate statute, yet, if that statute be construed as having the effect to exclude any opportunity to resort to a court of equity for an adequate determination of the questions involved, the result is a denial to the railroad companies of the equal protection of the laws. Not only is the remedy in equity under such circumstances the only adequate remedy, and not only are the railroad companies entitled to resort to that remedy so long as other property-owners (in matters where the necessity for resort to equity is far less) are permitted to resort to equity, but the peculiar circumstances of the subject-matter presented are such that trials of the right involved in proceedings by prosecuting officers or individuals are utterly and hopelessly inadequate, and cannot possibly accomplish the purpose for which the railroad company has the right to resort to the court at all.

2. THE PENAL PROVISIONS OF THE PASSENGER-RATE STATUTE BEING CONTRARY TO THE CONSTITUTION OF THE UNITED STATES, THE ORDER OF DISCHARGE WAS PROPER.

The right of a Circuit Court of the United States in a proper case to discharge a person who is in custody in violation of the Constitution of the United States is not questioned.

The propriety of discharging the prisoner in the present case seems equally beyond question.

If the Circuit Court had no jurisdiction of the Rate suit, the penal provisions of the passenger statute were contrary to the Constitution of the United States, for the reason that they amount to an unjust and prohibitive burden upon a resort to

the courts for a judicial determination of the judicial questions involved, and under no circumstances could afford an adequate remedy. It would have been the extremity of injustice to Wood and the other agents of the railroad company to permit them to remain in confinement pending the bringing of their cases to this court by writ of error to the highest State court having jurisdiction, and any such course would have effectuated the unconstitutional purpose of the passenger-rate statute.

Clearly, where the purpose of a statute is to compel a railroad company, without any judicial determination of the reasonableness of a statutory compensation, to give the use of its property for that compensation, and an unconstitutional plan is adopted for accomplishing this purpose, it is eminently proper to release from custody agents of the railroad company who are confined by virtue of, and as a part of, the unconstitutional plan of the legislature.

A distinct reason for interference by writ of *habeas corpus*, and a reason of the utmost importance, is the fact that the railroad company was a carrier of the United States mails, and was engaged in interstate commerce far more important in amount and extent than the intrastate commerce in which it was engaged in North Carolina. As shown by the opinion of the Circuit Court, the carrying out of the policy of the State to imprison the agents of the company under the unconstitutional penal provisions of the passenger-rate statute would have paralyzed the ability of the company to carry the mails and to conduct its interstate transportation business. These circumstances constituted a condition of the utmost urgency, and fully justified the release upon writs of *habeas corpus* of Wood and any other agents confined by virtue of the same unconstitutional provision.

There have been numerous instances of discharge upon writs of *habeas corpus* of persons in custody in violation of the Constitution of the United States, and it is not believed

that any case has presented circumstances of more serious urgency than those presented here.

Minnesota *v.* Barber, 136 U. S., 313.
Boske *v.* Comingore, 177 U. S., 459.
In re Ah Jow, 29 Fed., 181.
In re Davenport, 102 Fed., 540.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

WALKER D. HINES,
Of Counsel.

DECEMBER 17, 1907.

ALFRED P. THOM,
ALEX. P. HUMPHREY,
WALKER D. HINES,
Counsel.

APPENDIX I.

PROVISIONS OF NORTH CAROLINA STATUTES.

"The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies."

(Revisal of 1905, sec. 1066.)

PROVISIONS OF NEBRASKA STATUTES.

"That the board hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the board to perform the duties and carry out the objects for which it was created." * * *

(Compiled Statutes of Nebraska, ch. 72, art. VIII, sec. 12.)

"* * * said board (of transportation) shall have the general supervision of all railroads operated by steam in the State, and shall inquire into any neglect of duty or violation of any of the laws of this State by railroad corporations doing business in this State or by any officer, agent, or employee of any railroad cor-

poration doing business in this State." * * *

(Compiled Statutes of Nebraska, 1893, ch. 72, art. VIII, sec. 17.)

"The Commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

(Revisal of 1905, sec. 1113.)

No corresponding provision in Nebraska statutes.

"It shall be the duty of the Attorney General:

"1. To defend all actions in the Supreme Court in which the State shall be interested or is a party, and also when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter civil or criminal in which the State may be a party or interested."

(Revisal of 1905, sec. 5380, sub.-sec. 1.)

"The Attorney General shall appear for the State and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court in which the State shall be interested or a party, and shall also when requested by the Governor or either branch of the legislature appear for the State and prosecute and defend in any other court or before any officer any cause or matter, civil or criminal in which the State may be a party or interested.

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 1a.)

"The Attorney General may on his own motion or whenever thereunto requested by any officer of the Executive Department having charge of any official bond, contract or matter shall upon a breach thereof prosecute any official bond deposited in any office of the Executive Department or any contract in which the State is interested and may and when so requested shall bring, prosecute and defend for the State any suit, matter or thing, civil or criminal, in which the State is interested or relating to any matter connected with the Executive Department."*

(Ch. 83, art. V, sec. 2.)

*Sec. 1 of Art. 5, of the Constitution of Nebraska provides that "The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, and Commissioner of Public Lands and Buildings."

"At the request of the * * * Corporation Commissioners * * * he (Attorney General) shall prosecute and defend all suits relating to matters connected with their departments."

(Revisal 1905, sec. 5380, sub.-sec. 2.)

No corresponding provision in the Nebraska statutes authorizing the Board of Transportation to require the services of the Attorney General.

(It shall be the duty of the Attorney General) "to consult with and advise the Solicitors, when requested by them in all matters pertaining to the duties of their office."

(Revisal 1905, sec. 5380, sub.-sec. 4.)

"The Attorney General shall consult with and advise the District Attorneys when requested by them in all matters pertaining to the duties of their office; * * *"

(Compiled Statutes of Nebraska, 1893, ch. 83, art. V, sec. 3.)

"* * * The North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroads operating in this State on or before the first day of June, 1907."

(Sec. 2 of act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in Smyth *v.* Ames.

"That mileage books of one thousand miles in each book shall be kept on sale at such railroad ticket offices in North Carolina as shall be named and designated by the Corporation Commission of North Carolina and when such mileage book is purchased it shall be good in the hands of any person or persons named therein on all railroads on which the fare is the same as or less than the fare on the road of the company selling such mileage book; * * *"

(Sec. 3 of the act of March 2, 1907, in respect to passenger rates.)

No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

"That the Corporation Commission created by the laws of North Carolina shall not in fixing the maximum rates and charges * * * permit or allow any such common carrier to charge, * * * a greater * * * rate for the transportation of any article * * * where the initial point of shipment is on the road or line of one common carrier in this State and the terminal point of said shipment is on the line or road of another common carrier in this State, than is the sum of the present local rates now established, prescribed or approved by said Corporation Commission, less a reduction of 25 per centum. * * *" (Sec. 1 of the act of March 9, 1907, in respect to freight rates.)	No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.
"The Corporation Commission is hereby directed to prepare and publish the tariff of rates, charges and tolls to be charged and collected by railroad companies in this State as authorized by this act on or before July 1, 1907." (Sec. 5 of the act of March 9, 1907, in respect to freight rates.)	No corresponding provision in the Nebraska rate statute involved in the case of Smyth *v.* Ames.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 474.

THOMAS F. HUNTER, SHERIFF OF BUNCOMBE COUNTY, NORTH CAROLINA, APPELLANT,

v.

JAMES H. WOOD, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLEE.

ALEX. P. HUMPHREY,
WALKER D. HINES,
ALFRED P. THOM,
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IN THE

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SUPPLEMENTAL BRIEF FOR APPELLEE.

We desire by way of supplement to the briefs for appellee filed on the hearing of the cause, to make a few suggestions responsive to the brief filed for appellant, and to the position as taken by counsel for the appellant on the oral argument.

1. The appellant relies upon the opinion of the Supreme Court of North Carolina in the case of Southern Railway Company, plaintiff in error, against the State of North Carolina, recently decided, printed copy of which is filed with appellant's brief.

We submit that an examination of this opinion, so far from showing that the rate case brought by the Southern Railway Company was not within the jurisdiction of the Circuit Court of the United Stat[illegible] shows that the case fell within the principles of Smyth *v.* [illegible]es.

The case arose out of the indictment in Wake County, North Carolina, of the Southern Railway Company and Green, one of its agents. Both defendants were convicted, the Southern Railway Company being fined thirty thousand dollars. Green after conviction was asked whether he would agree to desist from selling tickets in the manner prescribed in the order of the Federal court, the court saying that if he did so it would impose a nominal fine, but if he would not so promise, the court would further consider what should be the sentence. Green made the suggested promise and was thereupon fined five dollars, and did not appeal. The Southern Railway Company did appeal. The Supreme Court of North Carolina reversed the judgment against the Southern Railway Company, upon the ground that the passenger rate act, having prescribed, as its only penalty against the railroad company, the right of individuals to maintain penal actions, the company could not be indicted by the State for a misdemeanor. This was all that was necessary to the decision. The court, however, undertook to examine the question as to whether the Circuit Court of the United States had jurisdiction of the rate suit. The result, however, of the examination by the court is that the court held that under the laws of North Carolina the passenger rate act could be enforced by officers of the State of North Carolina, other than the Corporation Commission and the Attorney-General. While the court said that the statute was self-executing, it did not decide that there was no duty respecting its enforcement laid by the statute law of North Carolina on the Railroad Commission and the Attorney-General. On the contrary, the court used this language at page 14:

> "There is nothing in our act which makes its operation depend at all upon anything to be done by the corporation commission, or the Attorney General or his assistant. The said officers last named are required to prosecute in the name of the State any crime committed in violation of the act, but *Ex parte* Ayres is direct authority that they cannot be reached by an

> injunction while in the performance of this official duty. Besides, can it be said, with any show of reason, or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney General in the prosecution of criminal cases, in which the State under our law, and the sovereign under all law, is the plaintiff of record and too the real plaintiff, is not in its very nature and in its natural and necessary effect, a suit against the State? Can it be said, in answer to this suggestion, that the State can proceed against criminals, and yet at the same time, that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the criminal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts."

The court distinctly recognizes the statutory duty of the Attorney General to enforce the passenger rate statute and fails entirely to notice or construe that by virtue of section 1113 of North Carolina Revisal of 1905 it was the express statutory duty of the Corporation Commission to enforce the statute. Thus under the laws of North Carolina, even in the light of this opinion, the connection of the Corporation Commission and the Attorney General with the enforcement of this statute is much clearer than was the connection of the Board of Transportation and the Attorney General of Nebraska with the enforcement of the rate statute involved in Smyth *v.* Ames. The court holds that no action of the Commission was necessary as a condition precedent to the rates going into effect, and the same condition was equally true with respect to the rate statute involved in Smyth *v.* Ames.

If, however, it were to be conceded that the opinion of the Supreme Court of North Carolina in the case under consideration is an authority against us, still, at most, it is only persuasive. It has been frequently held by this court that where a construction of a State statute is a matter of determination in a Federal court, neither the court of first

instance nor this court is bound by the construction of that statute made by a State court in a suit filed after the jurisdiction of the Federal court had been first invoked.

Julian *v.* Central Trust Co., 193 U. S., 103.
Burgess *v.* Seligman, 107 U. S., 20.

Nor is it believed that any authority can be found holding that the construction by a State court of a State statute in a matter involving the jurisdiction of a Federal court is binding upon a Federal court.

To the suggestion made in the opinion as to issuing injunctions against grand juries or the judges who preside in the courts of North Carolina, several answers may be made.

The fact that an injunction is not a perfect remedy is not a reason for not employing the remedy at all. It may be that a court cannot enforce an injunction by proceedings for contempt against grand juries or judges, but it can enforce it against other parties. Moreover, there are other remedies which can be applied in aid of the injunction against the action, even of grand juries or judges. It is, we repeat, no vital objection to any remedy that it is not a complete remedy.

Again, it is to be observed that this court will assume that the grand juries and judges of the State courts will, when the law has been declared by this court, conform thereto, and, therefore, if this court shall hold that the Southern Railway Company had the right to implead the North Carolina Corporation Commission and the Attorney General and obtain the interlocutory injunction, which it did obtain, and that the result of this is to prevent the State courts from doing anything which impedes or restricts the execution of the processes of the Federal court, neither grand juries nor judges, nor any other officers of the State, will attempt to do anything which is contrary to the law as thus declared by the tribunals having power to finally determine such matters.

This objection to the exercise of judicial power to grant an injunction in a rate suit goes far beyond this special

branch of jurisprudence. The objection, if valid, would render practicable the destruction of the judicial power of the Circuit Courts of the United States in any suit arising under the Fourteenth Amendment or the Commerce Clause. The objection, if valid, might result in the Federal courts being compelled to surrender portions of their jurisdiction in bankruptcy, admiralty and maritime matters, in all of which their jurisdiction is expressly made by the Constitution of the United States of paramount authority to any action taken by the tribunals of the State.

But a Federal court, without in any way interfering with the functions of the grand jury or judge, has ample methods of protecting its jurisdiction against any invasion which may be brought about by the exercise of criminal process; as, for example, by writ of injunction to prevent the collection of a money judgment, or by writ of *habeas corpus* to prevent the imprisonment of an individual.

It is assumed throughout the opinion of the Supreme Court of North Carolina in Southern Railway Company *v.* State, as well as throughout the argument of opposing counsel in this case, that there is some fundamental jurisdictional obstacle in the way of any court of equity upon the ground of the unconstitutionality of a State statute, restraining the assertion of a right claimed under that statute until there shall have been a final determination by the court of last resort that the statute is unconstitutional. We have already pointed out that a right asserted under a State statute is no more sacred than a right asserted by virtue of the common law or by virtue of any other condition which it is claimed brings a right into existence.

We wish to supplement this by calling attention to the fact that in numerous cases where this court has held that a suit may be maintained against State officers to restrain them from enforcing an unconstitutional statute, there have been restraining orders or interlocutory injunctions which, prior to any determination that the statute was unconstitutional, have served to restrain the effort to enforce the statute. We

have cited a number of these cases in the briefs already on file. In addition to these, we may call attention to the following cases which came to this court:

Osborne *v.* Bank of the U. S., 9 Wheat., 738.
Allen *v.* B. & O. R. R., 114 U. S., 311.
Cummings *v.* Bank, 101 U. S., 153.
In re Tyler, 149 U. S., 164.
Board of Liquidation *v.* McComb, 92 U. S., 531.

We have already called attention to the fact that in practically all of the rate cases, both in this court and in the inferior Federal courts, restraining orders and interlocutory injunctions have been granted temporarily suspending the enforcement of the rates the constitutionality of which was questioned.

A suggestion was made on the argument by counsel for the appellant to the following purport: It was said that as the Southern Railway Company could not sue the State of North Carolina, therefore, a decree rendered in the cause, either interlocutory or final, would not be binding upon the State of North Carolina. It was argued from this, that notwithstanding such decree, the State of North Carolina, through the machinery of its criminal courts, could indict persons who had charged a rate greater than that fixed in the acts relative thereto, and that the decree rendered in the rate case could not be interposed as conclusive of the validity of the act. This argument, of course, is equally applicable to a state of case where the final judgment has been rendered in favor of the carrier and this judgment has been affirmed in this court, as to a state of case where the court of first instance has issued an interlocutory injunction, and the case has not yet been tried. If the interlocutory order is not binding, neither is the final decree nor the affirmance of the final decree binding. If this is the law, then the remedy which this court has sanctioned in many cases involving these questions is a vain and futile one, and dependent en-

tirely upon the will of the State. The fundamental vice in this argument arises from its disregard of the real nature of suits challenging the validity of State legislation in reference to the rates to be charged by common carriers. The only persons pecuniarily interested in these rates, and, therefore, in any litigation arising out of statutes or orders of commissions fixing them, are the carrier, upon the one side, and shippers and travelers upon the other. When such rights have been determined in a suit where the carrier is represented upon the one side and the public is represented upon the other, the ultimate determination of the matter must be conclusive, because all persons interested are before the court, and have had opportunity to take part in, and have taken part in, the ascertainment of the result.

In the cases cited by the counsel for the appellant as illustrative of their contention (United States *v.* Lee, 106 U. S., 196; Tindall *v.* Wesley, 167 U. S., 204), it is to be observed that in the one the United States, and in the other, the State of South Carolina, might, notwithstanding the judgment, claim the property which was the subject-matter of the suit. But in the rate cases, if we have correctly stated their character, there is no property interest whatsoever in the State, the whole property interest being combined in the carrier, shippers, and travelers.

Again, the only purpose of any action upon the part of the State in a criminal proceeding or otherwise, with respect to a statutory rate which had been the subject matter of a suit in a Federal court, would be to secure the enforcement of that rate for the benefit of the individuals interested therein, either by some mandatory process or by imposing punishment for the failure to observe that rate. Now, if the Federal court had jurisdiction of the subject matter, to wit, of the question whether the railroad property should or should not be subjected to the public use for the rate of compensation specified by the statute, and had acted upon that subject matter by a decree restraining the enforcement

of that rate, then any action taken by any individual, whether at the instance of the State or not, designed to compel the enforcement of that rate, the decree of the Federal court to the contrary notwithstanding, would clearly be an obstruction of the process of the Federal court, and consequently a criminal contempt of its authority.

In re Lennon, 166 U. S., 548.
In re Reese, 107 Fed., 942.
Chisolm *v.* Caines, 121 Fed., 397.
Bessett *v.* Conkey, 194 U. S., 334.

In the last argument of counsel for appellant, a violation of the passenger rate statute of North Carolina was declared to be properly punishable, just as the crime of larceny is punishable. If this is a true view of rate laws, then the whole basis governing their consideration by this court, and the other courts of the United States, is swept away. In other words, if a statute fixing rates and imposing penalties therefor is analogous to statutes prohibiting larceny, burglary, and other similar offenses, then the jurisprudence on the subject of rate legislation must be reconstructed from its very foundation.

To be read after first new paragraph on page 8.

What is involved in this case is the taking of property—not the abstract right of a State to enforce its criminal laws. It is whether a State can, by means of its criminal laws or otherwise, take the property of a person contrary to the Constitution. The contention of the appellee is that a State cannot take the property of a person without giving an opportunity, unburdened and unpenalized either by statutory or common-law penalties, by means of which opportunity the person whose property is taken may assert his constitutional rights to his property, and that in cases within their jurisdiction the right of the person to assert his constitutional rights in the circuit courts of the United States must not be denied by a State.

likewise be liable to prosecution and conviction for every act done by them pending the litigation.

A plain statement of this proposition is its strongest refutation. The North Carolina passenger rate statute provides that every passenger who is charged more than 2¼ cents per mile for his ticket can have an action against the carrier for $500.00. It further provides that every agent and employee of the carrier who shall sell a ticket at a greater rate than 2¼ cents per mile shall be guilty of a misdemeanor, and subject to indictment and to punishment by a fine unlimited in amount, and by imprisonment of two years, to be worked out on the public roads.

The proposition is this: If the Circuit Court of the United States grants an interlocutory injunction, providing, as has here been done, a method by which tickets shall be sold at a greater rate than 2¼ cents, and shall finally grant a permanent injunction, holding that the rates are confiscatory, and the case shall then come to this court, there will certainly be consumed as much as two or three years before there is a final determination of the matter in controversy. During this entire period of waiting, every agent of Southern Railway Company who sells a ticket in North Carolina at a greater rate than 2¼ cents, is guilty of a crime, and subject to the degrading punishment indicated. When the case is brought here and submitted to this court for determination, every 24 hours of time which this court takes in the examination of the facts and the law, is rendering 500 people guilty of innumerable offenses for which they are subject to a punishment which would be overwhelming in its consequences.

To assert this doctrine is entirely to separate rate cases, their conduct, their consideration, the judicial power exercised in reference to them, from the whole body of equitable jurisprudence. It is to make of these rate cases a jurisprudence separate and apart, and barren of analogy to any other cases of equitable jurisprudence. For we confidently assert that

there is no principle of equitable jurisprudence more firmly settled than that it is within the competency of a court of equity to stay the hands of the defendant, pending the determination of the complainant's rights, upon such terms as seem to the court to be equitable, and that the complainant, at the conclusion of the litigation, can be visited with no consequences, except such as may be determined by the decree. The judicial power of a court of equity enables it to impose terms, but beyond these terms and their enforcement, the defendant can have no right, otherwise than in the exceptional instance of an action for malicious prosecution. Under the 93d Rule, if the Circuit Court should dismiss the bill, it can still continue the restraining power of the interlocutory injunction originally granted. The power to fix terms necessarily involves the power to make those terms exclusive—or, to state it more accurately, when terms are fixed, either for the granting of an interlocutory injunction, or for the suspension of an order dissolving an injunction, no other terms are binding upon the party in whose favor the order is made. Necessarily, such an order embraces the whole subject matter. Equity would never permit such penalties to be enforced, even against an unsuccessful litigant, if the litigation was instituted and conducted in good faith.

Opposing counsel attempt to meet the proposition that the penalties are unconstitutional by the argument that, if the penal provisions of the passenger rate statute are unconstitutional, such condition does not render unconstitutional the provisions of the statute declaring that the lawful passenger rate shall be 2¼ cents per mile, and that, this provision remaining lawful, it becomes a misdemeanor at common law for any person to violate this statutory provision. The implication seems to be that by no possibility can there be any evasion of the penalty existing by virtue of the common law.

It is unnecessary, for the purposes of this case, to explore the doctrine as to whether, at common law, it is a misde-

meanor to violate a statute of this character. If such a violation would be a misdemeanor, it would seem equally to be a misdemeanor to violate a statute against usury.

As a matter of legislative intention and construction, the argument of counsel is entirely unsound. The State of North Carolina, we will assume, passes a law providing that a carrier shall not charge more than 2¼ cents per mile. With a view to enforcing its mandate, it provides that every passenger who buys a ticket sold at a greater rate shall be entitled to sue the carrier for $500.00. It further provides that every agent violating the act shall be guilty of a misdemeanor, and punished in the terms of the statute, by fine and imprisonment, in the discretion of the court.

Now, these are the punishments which the legislature of North Carolina intended should be visited upon the one hand on the company, and upon the other hand on the agent, for violation of this act. No other punishments could have been within the intention of the legislature of North Carolina. The Supreme Court of North Carolina, in the case of Southern Railway Company *v.* North Carolina, on a writ of error from Wake County, decided that Southern Railway Company could not be indicted for a misdemeanor under this statute, because the legislature had fixed another punishment, namely, a penal action in favor of the purchaser of the ticket. If, therefore, the punishments announced by this act are unconstitutional, it cannot be asserted that the legislature of North Carolina would have visited either the railroad company or the agent with a common law punishment for a misdemeanor. It would be, indeed, a new construction of a criminal statute, to say that the court was not only at liberty to strike out of such statute its penal sections, but also to determine that, in lieu of such penal sections, there was thereby substituted other penal sections. There can be no crime and no punishment for a crime under a legislative mandate, unless both are distinctly demanded by the terms of the act as passed by the enacting power.

But, assuming that counsel are correct in the proposition that it would be a common law misdemeanor for any corporation or any agent of a corporation to violate the first section of the passenger rate statute, such condition does not destroy the operation of the Constitution of the United States. It is no more within the constitutional power of the legislature to fit a scheme of confiscation into common-law penalties than to fit such a scheme into statutory penalties.

The entire argument on behalf of opposing counsel proceeds upon theories which, if sound, wholly undermine the jurisdiction of the Federal courts in all rate cases, and upon the theory that any legislative declaration as to the compensation for which a railroad shall be devoted to the public use, must be considered only in the courts of the State, and never in the courts of the United States, except when brought upon a writ of error to this court from the highest State court having jurisdiction; and also upon the theory that the railroad company must, for protection against the harsh and even destructive method of enforcing statutes prescribing rates, look entirely to the clemency of the officers of the State; and upon the further theory that, pending the final determination of the so-called judicial review, the carrier will have to submit to the confiscatory rate.

Respectfully submitted.

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WALKER D. HINES,
ALFRED P. THOM,
Counsel.

DECEMBER 20, 1907.

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OPINION

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Construing Passenger Rate Act,

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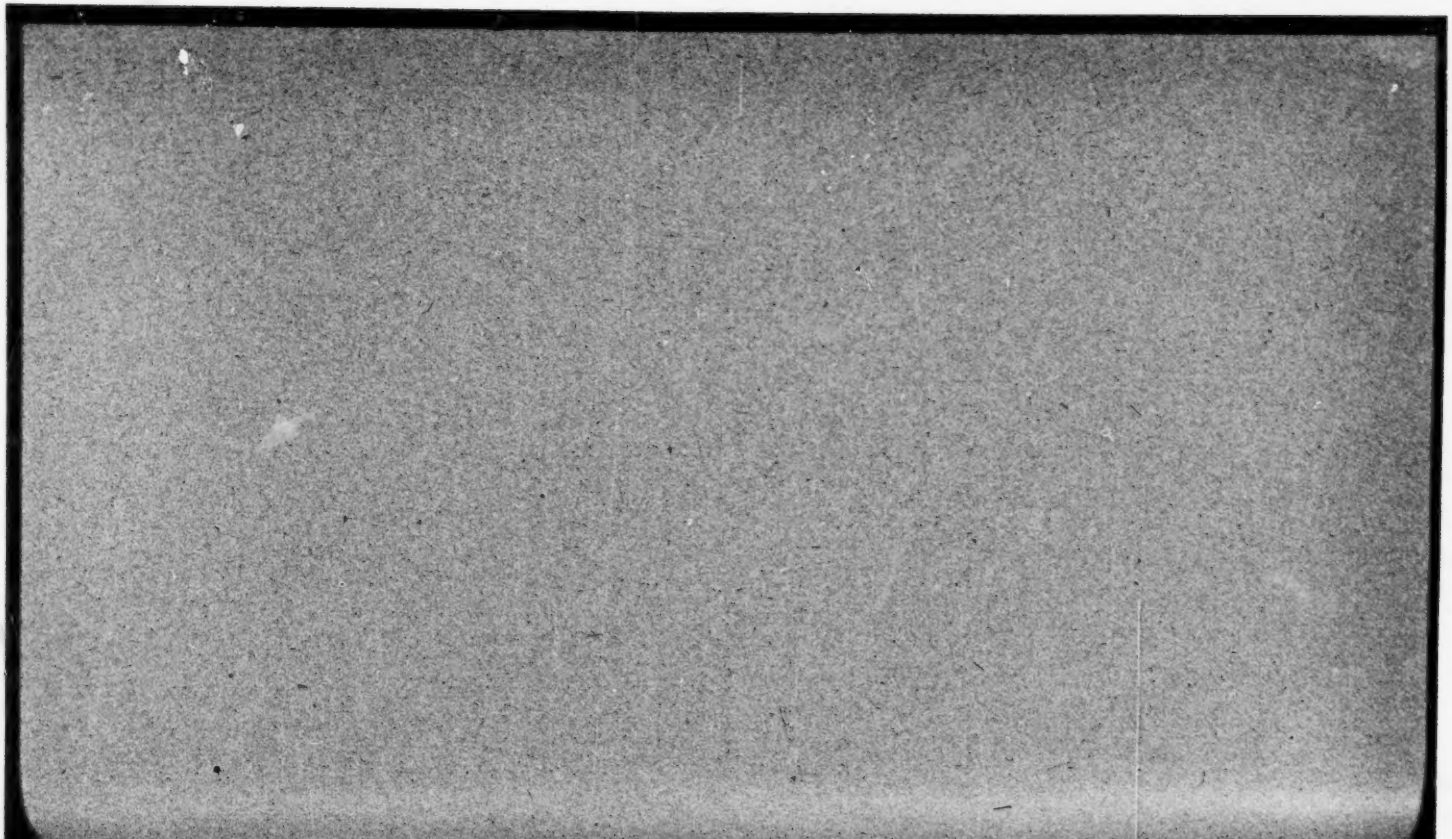

OPINION

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Construing Passenger Rate Act, Chapter 216, of the Public Laws of 1907.

WALKER, J., after stating the case:—

This in one respect is a case of supreme importance. It involves the right of the State to enforce its criminal laws without interference by the national government or its courts. If the defendant is right in its contention, the authority or separate sovereignty of the State is a myth and not, as we had supposed, a reality. We had taken it to be settled, without leaving room for cavil or controversy, that a Federal Court could not stay the arm of a sovereign State in the execution of its criminal laws. If any exception to this just and necessary rule exists, it must be a very rare one and cannot, for a moment, be considered as applying to this case. But before analysing the ingenious, but specious argument advanced in favor of so astounding a doctrine, as that upon which the defendant relies and showing its utter fallacy, let us consider first, the preliminary questions raised by the defendant. It is but fair to the able, learned and just judge who presided at the trial that we should do so. The defendant complains that it was not given proper time to prepare its defense. In other words, that it was forced hurriedly into the trial and too, with such undue haste as to deprive it of the ability to concert its defense. This is a grave charge to make and if substantiated by the record, it was a violation of the defendant's constitutional rights, we admit, but we are able to state that it is met conclusively and disproved by the facts, as they appear in the case. We are convinced that every reasonable opportunity was afforded the defendant, not only for enter-

ing its pleas and submitting its motions, but for trying the case and defending itself upon the real legal merits. The presiding Judge distinctly announced that the court would sit as long as it was necessary to develop all the facts of the case, even though the term of the court should be extended beyond the time allotted by the statute. This the Judge had the power to do. Revisal, Section 3266. Could the defendant expect to receive a more liberal allowance of time? The other positions taken are equally untenable and we overrule all of the preliminary motions as dilatory and declare that the Judge's ruling thereon did not affect any substantial right of the defendant. We will not refer to the other exceptions, as the view we take of the case renders it unnecessary to do so. The defendant received absolutely fair treatment from the Court, in every respect.

We now proceed to consider the case upon its legal merits. Two questions are raised: 1. Did the proceedings in the United States Circuit Court constitute a defense to the indictment or prevent the grand jury from returning the bill and the State Court from taking cognizance of the same and trying the case? 2. Is any criminal offense charged in the bill of indictment? These are the pivotal and decisive questions in the case. We would not discuss the first question stated, in view of our ruling upon the second, but for the fact that the arguments of counsel and their briefs are largely devoted to its consideration and it is a question of the greatest magnitude and gravity. We think, though, that it has been conclusively settled against the defendant's contention by the rulings of the Court of last resort, having the power and jurisdiction to finally pass upon it. It is so serious a question and so far reaching in its consequences, if the defendant be right in respect to it, that it cannot, perhaps, be too often decided against its present contention if this is to remain a government of the people, by the people and for the people, as originally contemplated by its framers and the rights of the States are to be preserved unimpaired. If it is ever held, as it surely will not be, that the Federal Courts can virtually take charge of our State governments by the process of injunction the separate sovereignty of the States, as distinct from that of the Federal government, will be completely extinguished. It has been said, at least once by the Court of highest authority: "We have already had occasion to remark at this term that 'the people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution but it may be not unreasonably said that the preservation of the States and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the

National Government. The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States." Texas vs. White, 7 Wallace, p. 725; Lane vs. Oregon, 7 Wall. 71. And this was so said since the thirteenth and fourteenth amendments to the Constitution of the United States were ratified. Can this possibly be so, if the defendant's contention as to the effect of the equity proceedings in the Federal Courts, is the correct one. The trend of the argument they now make was clearly seen at once by the Supreme Court of the United States, and they paused to examine it and refused finally to accept it as based upon the correct theory of our government. If we adopt it as sound and carry it to its logical result, it would destroy the proper functions of the State. We will first refer to the latest exposition of the Constitution in this respect and quote from the most recent case upon the subject, decided in 1906, at the last term of the Supreme Court of the United States (Urquhart vs. Brown, 205 U. S. 179, opinion by Justice Harlan): "It is the settled doctrine of this Court that although the Circuit Court of the United States, and the several justices and judges thereof have authority, under existing statutes, to discharge, upon *habeas corpus* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing under our present government, between the judicial tribunals of the Union and of the several States, a Federal Court or a Federal Judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under state authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a Federal Court or Judge may sometimes appropriately interfere by *habeas corpus* in advance of final action by the authorities of the State, are those of great urgency that require to be promptly disposed of, such, for instance, as cases "involving the authority and operations of the General Government, or the obligations of this country to, or its relations with foreign nations. The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon *habeas corpus*, in the Supreme Court of the State was in violation of his rights, under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court." The same court, in Reid vs. Jones, 187 U. S. 153, said that one convicted for an alleged violation of the criminal statutes of a State, and who insists that he is held in violations of the Constitution of the United States, "must ordinarily first take his case to the highest court of the State, in which

the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State." So in Drury vs. Lewis, 200 U. S. 1, it was held that in case of the custody by state authorities of one charged with crime, the settled and proper procedure is for a Circuit Court of the United State not to interfere by *habeas corpus*, "unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State Court, the Federal Courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under an indictment in a State Court and subject to its laws may, by the decision of a single judge of the Federal Court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom." It is true, and we will give the defendant the full benefit of this concession, that in Urquhart vs. Brown, supra, the court was considering a question, which arose upon a petition for the writ of habeas corpus, but it is not so much the particular form of the controversy, as the principle involved in it that controls as a precedent. The point intended to be decided was that full play should be given to the procedure of the State Courts in the prosecution of its criminals, provided the latter have the right of appeal to the courts of last resort in the State, to the judgments of which a writ of error will lie from the Supreme Court of the United States to review the judgment of the State Court, when any question as to an invasion of the Constitutional rights of the defendant may be presented. Instead, therefore, of pleading the proceedings in the Federal Court, the defendant should have set up its defense upon the merits in the State Court and have brought any unfavorable or adverse rulings of the court below here for review, and if it had been deprived of any constitutional right or guaranty, we would have corrected the error. If we should have decided against the defendant's contention, for example, that its property was about to be confiscated and its constitutional rights denied, it still would have had the remedy by writ of error to review the judgment of this court, that is, if Urquhart vs. Brown states the correct principle and will continue to stand as a precedent, and we think, without doubt, that it will.

But there is a more serious and conclusive answer to the defendant's contention. It is stated with great clearness and force in the briefs of counsel for the State, where the true doctrine is ably and learnedly presented. The question of separate State sovereignty may not directly and necessarily be involved, but it is incidentally.

Can a judge of the Circuit Court of the United States, stay proceedings by the State in the prosecution of its criminals? This is not too broad a statement of the proposition upon the affirmative of which the learned counsel for the defendant rest their case. Let us see what this court, and the Supreme Court of the United States whose decisions we must respect and obey, have said upon this subject. It should require no labored argument to demonstrate the fallacy of the defendant's position. The question is merely what has been decided, for the identical matter has frequently been considered and determined by this court and by the Supreme Court of the United States. There can now be no doubt, as to how this Court has ruled upon it, and that ruling is in perfect harmony as we think, with the determination of the highest court. If anything, the latter has been more pronounced in denying to the Federal Courts the jurisdiction now asserted to reside in them. The question was fully considered by this court in Paul vs. Washington, 134 N. C. at p. 380, and, without quoting liberally from the opinion, we will extract therefrom the general principle established. It is there substantially said that there are two objections to the plaintiff's right to maintain this action, first, the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penalties. In regard to the first objection, we must bear in mind that if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the State in whose soverign name and capacity all criminal cases are commenced and prosecuted, and the State is not even a party to the action and her rights cannot be prejudiced without notice and a hearing, even of we could entertain for a moment, with any seriousness, the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by our statute a misdemeanor. Code, Section 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the rights of the complaining party or, in this particular case, the validity of the ordinance has been first determined in an action at law. In Wallace vs. Society, 67 N. Y., 28, the general rule is stated to be that a court of equity will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the Chancellor in West vs. Mayor, 10 page

539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a municipal corporation ordinance claimed to be invalid. The unconstitutionality of the Act of 1872, he said, would be a perfect defense to a prosecution for the penalties given by it, and the question as to the validity of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage rather than restrain litigation. The question as to the validity of a corporation ordinance does not properly belong to the court for decision, where the complainants, as in the case presented have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalties. And it would be an usurpation of jurisdiction by the court, if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. The court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits. We find the rule stated in the 16 Am. & Eng. Enc. of Law, (2 Ed.) at p. 370, as follows: " It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void or that the party seeking the injunction has not committed a violation of the ordinance, or that the complainant in the prosecution under the ordinance states no cause of action." We have no case, however, says the court in Burwell vs. Craig, 30 Ala. 138, "where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits or to avert irreparable mischief. The judgment and sentences of the town council, of which the appellant complains, were quasi criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal, or to restrain a tres-

pass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case, simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant; they will be considered when properly presented." And later in Moses vs. Mayor, 52 Ala. 198, it was held by the same court, that courts of equity will not interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters; at least a court of equity cannot entertain a bill on this ground alone. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of the first impression, and there is neither principle nor authority to support it. Municipal authorities, it is said, would be paralyzed in discharging the public duties entrusted to them, if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. The counsel for the appellant sought to withdraw the case presented in the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, that the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the court. In Hottinger vs. New Orleans, 42 La. Ann., 629, the court refused to exercise its equity jurisdiction to restrain the enforcement of an ordinance penal in its nature upon the ground that "The ordinance was enacted in pursuance of the police power vested in the city, whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot therefore be considered in determining the question of jurisdiction. The enforcement of the ordinance is vested by the Constitution and law of the State in the Recorder's Court of the City of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy and can urge her defense in the Recorder's Court. Failing there she has her remedy by appeal to this court." See also Devron vs. First Municipality, 4 La. Ann., 11; Beach on Injunction, Sec. 520; Eldridge vs. Hill, 2 Johns Ch. 281; Field vs. Western Springs, 181 Ill. 186; 1 Spelling Inj. & Extr. Rem., Sec. 694; Burch vs. Cavanagh, 12 Abb. Pr. Rep. 410; Wardens vs. Washington, 109 N. C. 21; Scott vs. Smith, 121 N. C. 94; Vickers vs. Durham, 132

N. C. 880; Busbee vs. Lewis, 85 N. C. 332; Busbee vs. Macy, 85 N. C. 329; Pearson vs. Boyden, 86 N. C.. 585. In Cohen vs. Commissioners, 77 N. C. 3, the court held that if the defendants have an unlawful and void ordinance and have arrested and fined the plaintiff, he has a complete remedy at law, by exception and appeal, and cannot resort to the jurisdiction of a court of equity for relief. "We are aware of no principle or precedent for the interposition of a court of equity in such cases." All the cases we have cited were approved by this court in Paul vs. Washington, the opinion, in which the principle was considered and the case relied on were reviewed, having been concurred in by four of the members of the court, as then constituted, the Chief Justice, Justice Douglas, Justice Connor and the writer of this opinion, and becoming thereby the opinion of the court upon that question, which really decided the case (as Justice Douglas well said), without regard to the question as to the validity of the ordinances. In the leading opinion, the correctness of some of the decisions is questioned, but the learned Justice, who spoke for the court, frankly states that while "the writer of this opinion is in sympathy with the argument of the counsel of the appellant, the majority of the court are of the opinion that the law as laid down in the cases above cited is correct in principle and applies to the facts of this case, and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction." So that the doctrine may be considered as settled in this State against the right of a court exercising equitable jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws of the State. Whether this rule is of universal application or will, in extreme circumstances, admit of exception, when justice would otherwise be defeated, we need not, as the principle thus established is clearly applicable to the facts of this case. If the court of a State will not thus interfere with another court of the same State and arrest by injunction the prosecution of a defendant for a crime, surely it will not recognize the power of a court in another and practically a foreign jurisdiction to do so. We must adhere to our own rulings, which have become settled precedents upon this subject, and hold that the United States Circuit Court had no power to enjoin the prosecution of the defendant in the court below and the proceedings of the court introduced in evidence and on which the defendant relies, can afford it no protection against the indictment or prevent a conviction thereunder.

This places our decision, so far, upon a general principle in the law of injunction which governs in courts of equity. But the same doctrine, to the extent that it affects this case, and as obtaining in the Federal Courts, is fully stated by Justice Gray in Ex parte Sawyer, 124 U. S. 200: "Under the Constitution and the laws of the United States, the distinction between common law and equity, as existing in England, at the time of the separation of the two countries, has been

maintained, although both jurisdictions are vested in the same courts. The office and jurisdiction of a court of equity, unless enlarged by express statute are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity, to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or the executive and administrative department of the Government. Any jurisdiction over criminal matters that the English Court of Chancery ever had, became obselete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; Gee vs. Pritchard, 2 Swanst., 402, 413; 1 Spence, Eq. Jur. 689, 690; Atty. Gen. vs. Utica Ins. Co., 2 John. Ch. 371, 387. From long before the Declaration of Independence it has been settled in England, that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause, that he should not move for an injunction in Chancery in the meantime, said: 'Sure Chancery would not grant an injunction in a criminal matter under examination in this court, and if they did this court would break it and protect any that would proceed in contempt of it.' Holderstaffe vs. Saunders, 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: 'This court has not originally and strictly any restraining power over criminal prosecutions;' and again, 'This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus; nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' Mayor and Corporation of York vs. Pilkinton, 2 Atk., 302 S. C. 9 Mod. 273; Montague vs. Dudman, 2 Ves. Sr. 396. The modern decisions in England by eminent equity judges, concur in holding that a Court of Chancery has no power to restrain criminal proceedings, *unless they are instituted by the party to a suit already pending before it, and to try the same right that is in issue there.* Atty. Gen. vs. Cleaver, 18 Ves. Jr., 211; Turner vs. Turner, 15 Jur. 218; Saull vs. Brown, L. R. 10 Ch. 64; Kerr vs. Preston, L. R. 6 Ch. D., 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same

doctrine. Story Eq. Jur., Sec. 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the State or under municipal ordinance," citing many cases to sustain the principle.

There is, perhaps, a more conclusive reason why we should hold that the suit in equity pending in the United States Circuit Court and the restraining process issued therein by the Circuit Judge cannot be of any avail to this defendant, so as to prevent a prosecution against it in a State Court for the commission of a crime. The Circuit Court of the United States had no jurisdiction to entertain a suit to enjoin a State, brought by a citizen of any other State or country, even though it may appear that the law, upon which the prosecution in the State Court is founded, conflicts with the Constitution of the United States and is therefore void. This rule is evolved from the Eleventh Amendment to the Constitution, which provides, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." It is well known that this provision was inserted in the Constitution as a result of the decision in Chisholm vs. Georgia, 2 Dallas 419, decided in 1793, and it was construed in Osborne vs. Bank, 9 Wheat. 738, in which case the Court said: "That in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against the States, is of necessity limited to those suits in which a State is a party on the record." But that narrow interpretation of the Amendment, had long since been rejected by the same court and by many successive decisions it has firmly etablished the principle to be that, if the State is substantially or really a party to the record against whom the suit is directed, she comes within the protection of the amendment. In Ex parte Ayers, 123 U. S. 443, a leading case upon this question, it appeared that Ayers, as Attorney General of the State of Virginia and the Commonwealth Attorneys of the several judicial circuits were authorized, by a legislative act, to bring suit against delinquent tax payers, who had tendered coupons, which had been taken from the bonds of the State, in payment of taxes, the burden of proving the genuineness of the coupons being placed by the act upon the defendants. A suit in equity was brought in the United States Circuit Court to restrain and enjoin the said Ayers from bringing actions under the Act or attempting to enforce its provisions and an injunction was issued from that court according to the prayer of the bill. Ayers refused to obey the writ and was accordingly attached for contempt, whereupon he applied for and obtained a writ of habeas corpus from the Supreme Court of the United States and at the hearing was discharged from custody. With reference to these facts the court, by Justice Matthews, said: "The

question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill was by final degree perpetually to enjoin the defendants from taking any steps in execution of the act of May 12, 1887. The principal contention, on the part of the petitioners, is that the suit nominally against them is, in fact, and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the 11th Amendment it not always determined by reference to the nominal parties on the record.' Poindexter vs. Greenhow, 114 U. S. 270. This, it is true, is not in harmony with what was said by Chief Justice Marshal in Osborn vs. Bank of U. S., 22 U. S. (9 Wheat.) 738. Accordingly in Cunningham vs. Macon, B. R. R., 139 U. S. 446, it was decided that in those cases, where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The relief so sought is against the defendants, not in their individual, but in their representative capacity, as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by a process served upon its Governor and Attorney General, according to the precedents in such cases. If a decree could have been rendered enjoining the State from bringing suit against its tax-payers, it would have operated upon the State only through the officers who by law are required to represent it in bringing such suits, namely, the present defendant, its Attorney General, and the Commonwealth's Attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and inprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, attorneys and agents? And if all such officers, attorneys and agents are personally subject to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual

and real defendant. It is, however, insisted upon in agreement, that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the State from executing the provisions of State statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this court, and that the present case is covered by their authority."

The court, after reviewing the authorities at length, denied the contention of the complainants and held with the petitioner that the suit was one against the State and the proceedings against him for the alleged contempt in disobeying the order of injunction therein issued, was consequently null and void. Referring again to the suit in equity for an injunction as being one essentially against the State of Virginia in its sovereign capacity, though nominally against its prosecuting officers, the court said: "It is therefore within the prohibition of the 11th Amendment to the Constitution. *By the terms of that provision it is a case to which the judicial power of the United States does not extend.* The Circuit Court was *without jurisdiction* to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

The next case in order, which presented the precise question we have here, is Reagan vs. Loan & Trust Company, 154 U. S. 362. It was attempted in that suit, as here, to enjoin the Corporation Commission and other officers of the State of Texas from enforcing a statute authorizing them to prescribe the maximum rate of charges by railroad as carriers. The court laid down certain specific propositions as having been settled by its former adjudications. The great question involved is stated to be, the right of the State to regulate or limit traffic charges and it was held that the legislature has the power to fix rates and the extent of judicial interference is protection against unreasonable rates. The question of the validity of a rate or charge for transportation in respect to passengers or freight, involving as it does the element of reasonableness, both as regards the company and as affecting the public, is eminently one for judicial investigation, requiring the process of law for its determination. Railway Co. vs. Minnesota, 134 U. S. 418. The power thus to regulate the affairs of corporations and, in the case of carriers, to limit their charges for transportation, is not without limit. It is not a power to destroy, and regulation is not the equivalent of confiscation. Under the pretense of prescribing a maximum charge for fares and freights, the State cannot require the carriers to transport persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. Stone vs. Loan & Trust Co., 116 U.

S. 307; Dow vs. Beidelman, 125 U. S. 680. It was also held by the court that the undoubted general power of a State to regulate the fares and tolls which may be charged and received by railroad or other carriers can be exercised through the medium of a commission or administrative board created by the State for that purpose and in order to execute the will of the State as expressed by its legislation. Stone vs. Loan & Trust Co., 116 U. S. 307. In that case it was held to be the settled doctrine of the court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by character contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, nor take away from the corporation the equal protection of the laws. While the principles thus stated were recognized and affirmed in Reagan vs. Loan & Trust Co., supra, the court distinctly adopts, as a rule equally well established, what is said in Ex parte Ayers, supra. Justice Brewer, delivering the opinion of the court, refers to that decision and classifies the cases in which interference by injunction is and is not permitted; he says: "We are met at the threshold with the objection that this is a suit against the State of Texas, brought by a citizen of another State and therefore, under the 11th Amendment to the Constitution, beyond the jurisdiction of the Federal Court. The question as to when an action against officers of the State is to be treated as an action against the State, has been of late several times carefully considered by this court, especially in the case of Ex parte Ayers, 123 U. S. 433. To secure the manifest purpose of the constitutional exemption guaranteed by the 11th Amendement, requires that it would be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectually operates. It is well settled, that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides, 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is *absolute* and *unqualified* and the constitional provision securing it is not so construed as to place the State within the reach of the

process of the court. Accordingly it is equally well settled that a suit against officers of a State to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the State itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is when the suit is brought against the officer of the State, as representing the State's action and liability, making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." In the Reagan case, the suit had proceeded to final hearing and decree and a perpetual injunction was granted upon the findings of fact, which showed that the rates were confiscatory and, besides, the legislature did not itself prescribe the maximum of charge for transportation, but left that matter to be determined by the commission. The provisions of the act were not enforcible except by the commission. In this particular, that case and this one are clearly distinguishable. Before proceeding to discuss further the rulings in the Supreme Court of the United States upon this important and far reaching question which now engages perhaps more of the attention and anxious consideration of the public and of the courts of this country than any other, as it should, for it vitally concerns the due and lawful exercise of the powers conferred by the Constitution upon the Federal Government and those reserved respectively to the States or to the people and should be settled definitely and conclusively in order to avoid unfortunate judicial conflicts, we will pause to decide one question involved in this case, which also differentiates it from Reagan vs. Loan & Trust Co. There is nothing in our act which makes its operation depend at all upon anything to be done by the corporation commission, or the Attorney General or his assistant. The said officers last named are required to prosecute in the name of the State any crime committed in violation of the act, but Ex parte Ayers is direct authority that they cannot be reached by an injunction while in the performance of this official duty. Besides, can it be said, with any show of reason, or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney General in the prosecution of criminal cases, in which the State under our law, and the sovereign under all law, is the plaintiff of record and too the real plaintiff, is not in its very nature and in its natural and necessary effect, a suit against the State? Can it be said, in answer to this suggestion, that the State can proceed against criminals, and yet at the same time, that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the crimi-

nal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts. The act provides (Public Act of 1907, Ch. 216, Sec. 7), that it shall be in force from and after July 1, 1907, and the provision that the Corporation Commission is required to publish the rates "fixed by this act," on or before June 1, 1907, for the information of the public and the railroads concerned, is directory, and was not intended to stay the operation of the act beyond July 1, 1907, should the commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect. The maximum rate prescribed by the act was unconditionally effective from and after July 1, 1907, and the act was therefore self-executing. For this reason alone, if for no other, the suit in equity pending in the United States Circuit Court cannot be permitted to affect the proceedings in the court below in this case.

The case of Railway Co. vs. Minnesota, 134 U. S. 418, so much relied on by the defendant's counsel, is also far from being an authority against the ruling we now make. The act construed and held valid in that case, provided that the tariff of rates as made and published by the Railroad Commission should be final and conclusive as to what are equal and reasonable charges and that there should be no judicial inquiry into the matter for the purpose of determining the reasonableness of the rates so prescribed. Quite a different case from this one. We do not say that a judicial inquiry cannot be made in a proper way, but that the State, in the exercise of its sovereign power, cannot be enjoined under the guise of restraining her officers in the performance of a duty which is not required to make the rate act effective. Nor can the state be controlled by the Federal Courts in the execution of her criminal laws. But it may be remarked, in passing, that the opinion of the court in Railway vs. Minnesota, as well as the concurring opinion of Justice Miller, especially cited by the defendant's counsel as controlling this case was met by an exceedingly strong dissent from Justices Bradley, Gray and Lamar, who asserted that what is a reasonable charge is not a judicial question, but is "pre-eminently" a legislative one involving consideration of public policy as well as of remuneration, and that the legislature may itself fix the maximum and thus exclude judicial inquiry or it may merely provide that the rate shall be reasonable, or that reasonable rates shall be determined by a commission or by the common law, when the question of reasonableness is open to judicial investigation. They further asserted that the court in Railway vs. Minnesota, had virtually overruled Munn vs. Illinois, 94 U. S. 113, and the cases afterwards decided and based upon the principle of that case. When we consider the real nature of a corporation, the source of its creation, and the tenure, if we may so speak, by which it exercises its privileges and franchises, and indeed holds its property, the reserved power of the State with respect to them and many other facts and reasons that can easily be adduced,

it may well be a question whether the advantage and strength of the argument in that case was not all with the dissenting justices. But accepting the principle announced by the majority of the court, as the law with us, and we so accept it, it does not bear upon this case and should not control our decision. We also think the many other cases on which the defendant's counsel rely are equally inapplicable to the facts of this case. There is no evidence in this case, and of course no adjudication binding upon us, that the rate prescribed by the Act of 1907 is confiscatory nor do we understand the defendant to rely upon the record of the proceedings in the Federal Court as establishing that fact, (for it would not be evidence for that purpose) but merely as showing that complete and exclusive jurisdiction of the entire matter was in that court by virtue of the suit therein pending and that its order of injunction extends so far, in its broad sweep, as to stop the State in the ordinary enforcement of its criminal laws. This would be a very alarming doctrine, if true, but fortunately it is not.

Recurring to that part of our opinion where we digressed, in order to consider the nature of the Act of 1907, and to determine when it became effective and to distinguish from the case at bar certain cases decided by the Supreme Court of the United States, which it is contended by the defendent are decisively in its favor, we will refer to one other case recently decided by that court.

In Fitts vs. McGhee, 172 U. S. 416, it was attempted to enjoin the Attorney General of Alabama, and the Solicitor of one of her judicial circuits from prosecuting suits for penalties provided for violations of an act fixing the maximum tolls to be charged by a bridge company for the use of its bridge across the Tennessee River. The Supreme Court denied the jurisdiction of the Circuit Court of the United States and the case, as we understand, established three propositions, as follows: "1. A suit to restrain officers of a State from taking any steps by means of judicial proceedings, in execution of a State statute to which they do not hold any special relation, is really a suit against the State within the prohibition of the 11th Amendment to the Federal Constitution. 2. The Circuit Court of the United States sitting in equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in a State Court. 3. The power of the Federal Courts to interfere by habeas corpus with the trial of indictments found in State courts, on the ground that the State statutes under which the indictments are found are repugnant to the Federal Constitution, laws or treaties, will not be exercised, in the first instance, unless there are exceptional or extraordinary circumstances to require it, but the party will be left to make his defense in the State Court." In the course of the opinion Justice Harlan says: "Let them appear to the indictment and defend themselves upon the ground that the State statute is repugnant to the Constitution of the United States. The State Court is competent to determine the question thus raised and is under a duty to

enforce the mandates of the supreme law of the land. Robb vs. Connolly, 111 U. S. 624. And if the question is determined adversely to the defendants in the highest court of the State, in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted, constitutes no reason why a Federal Court of equity should assume to interfere with the ordinary course of criminal procedure in a State Court." The court then proceeds to distinguish the cases cited in the defendant's brief filed in this court, upon the ground that the State officer in each of them was committing, or about to commit, some specific act or trespass to the injury of the complainant's rights. Other equally satisfactory reasons could be assigned why the suit in equity now pending in the Circuit Court of the United States, should not be allowed to defeat the prosecution of the indictment in the court below, but we do not deem it necessary to consider or even state them, as what we have already said upon this point is sufficient to convince us that the Federal Court was and is without jurisdiction to stay the institution of criminal proceedings in a State Court, and we would affirm the judgment in this case, if it did not appear that no criminal offense is charged in the bill of indictment. We will now consider that question. The State contends that the first section of the Act of 1907, contains a distinct prohibition against common carriers of passengers charging more than two and one quarter cents per mile and that while a penalty is imposed for a violation of that section, it is done by a subsequent section of the Act and where this occurs, although the offense may be a new one, or one not existing at the common law, the State can proceed by indictment to punish a violation of the first section, and the party specially aggrieved thereby may also at the same time recover the penalty, it being conceded as we understand, that if the penalty had been imposed in the first section where the prohibition is found, this would not be so, and an indictment would not lie. If there is any respectable authority for such a position, and we do not think there is, it is not only inherently unsound, but exceedingly refined and technical, and Mr. Bishop says that it is not only refined but is contrary to all reason. It is a distinction without a difference in law or in fact. The act prohibits a charge above two and a quarter cents and then provides in a subsequent section (4), that any railroad company violating its provisions shall be liable to a penalty of $500 for each violation, recoverable by the person aggrieved in a civil action, and any agent of the company violating the act shall be guilty of a misdemeanor. How could the legislature more clearly or convincingly have expressed its intention to discriminate, as to the consequences, between a violation of the railroad company and a similar violation by its agent, and what practical difference can it make whether the penal provisions is in the first or the fourth section of the act? Does not the latter section distinctly refer to the

former, the same as if it had been incorporated with it?' The rule of construction relied on by the State seems to have arisen from a total misconception of the English authorities, and a rank dictum of Justice Ashurst in Rex vs. Harris, 4 T. R. 205, with no authority cited to support it. Lord Kenyon, who wrote the leading opinion in the same case, expressly stated that the offense created by the Act of Parliament (26 Geo. 2 Ch. 6, Sec. 1), namely disobedience of an order of the King in council, was in itself an offense at common law and Lord Ashurst afterwards, in his opinion, explains, if he does not destroy his dictum by confining it to the special facts of that case. The law is thus stated by Bishop in his work on Statutory Crimes (1873) Sec. 250: "The doctrine is that, where an offense is created by statute, and the same statute prescribes the penalty, or the mode of procedure, or anything else of the sort, only that which the statute prescribes can be followed. But where the offense is at common law, statutory provisions not directly repugnant to the common law are cumulative, and either law may be followed. And where a statute forbids a thing before lawful, but provides no penalty, the indictment for the offense is at common law. So, where it prescribes no mode of prosecution, the common law indictment lies." He cites numerous cases in the note to that section, among them several English cases, which sustain his statement of the rule and under it the case of Rex vs. Harris, supra, was correctly decided, because the penalty imposed by the statute construed in that case was for an offense which previously existed at the common law. The authorities cited by the learned counsel for the State, can be easily reconciled with the principle as stated by Mr. Bishop, if they are read with reference to the particular facts being considered in them. Reg. vs. Buchanan, 8 Ad. & El. (55 E. C. L.) 883, was a case of like kind with Rex vs. Harris, as the offense of an attorney practicing without having been duly admitted or called to the bar, or enrolled, was made a contempt of court which, we know, and it is so held in the opinion of Lord Denman, was also a misdemeanor at common law. It is intimated by the Chief Justice that if a penalty has been imposed, instead of the remedy by attachment for contempt given, the result in that case would have been different. Section 237 cited from 1 Bishop on Cr. Law is, in our opinion, inferentially against the State's contention. We reproduce it here: "It is obvious that to prohibit a thing by a statute is to bring it within the jurisdiction of the tribunals. Whence we see, carrying in our minds what is stated in the last section, how and why, as explained in another volume, when a statute forbids a thing affecting the public, *but is silent as to any penalty*, the doing of it is indictable at the common law." (Italics ours). In Rex vs. Wright, 1 Burr. 542, it was held that "indictment lies not upon an act of Parliament, which creates a new offense and prescribes a particular remedy." Lord Mansfield said in that case: "I always took it, that where

new created offenses are only prohibited by the *general prohibitory* clause of an act of Parliament, an indictment will lie; but there is a prohibitory *particular clause*, specifying only *particular remedies*, there such *particular remedy* must be *pursued*. For otherwise the defendant would be liable to a double prosecution; one upon the general prohibition, and the other upon the particular specific remedy." And when afterwards informed that the counsel for the crown "gave up the matter," replied. "I do not wonder at all at it; I thought he would do so. I have looked into it and there is nothing in it. That case of Crofton (where the contrary is supposed to have been decided) has been *denied* many times." In Rex vs. Robinson, 2 Burr. 799, 803, the great Chief Justice (Lord Mansfield) said: "But where the offense was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding there, *either* method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute because there the sanction is cumulative, and does *not exclude* the common law punishment. 1. Salk. 45. Stephens vs. Watson was a resolution upon these principles; in that case, keeping an alehouse without license was held to be *not* indictable, because it was *no* offense at common law; and the statute which makes it an offense, has made it punishable in *another manner*. "And again in the same case when discussing the same point he sums up, at p. 805 as follows: "The true rule of distinction seems to be that, where the offense intended to be guarded against by a statute, was *punishable before* the making of such a statute prescribing a particular method of punishing it, there such particular remedy is *cumulative* and does not take away the former remedy; but where the statute only enacts 'That the doing any *act not punishable before*, shall for the future be punishable in such and and such a *particular* manner,' there it is necessary that such *particular* method, by such act prescribed, must be *specifically pursued;* and not the common law method of an *indictment*." In Castle's Case, 2 Cro. Jac. 644, it was resolved that where a statute imposes a penalty for doing a thing, which was no offense before, and provides how it shall be recovered, it shall be punished by that means, and not by indictment. The offense being new, the particular mode of punishment must be pursued. The generally accepted rule upon this subject is thus stated in McClain's Cr. Law, Sec. 8: "If the act prohibited had been previously an indictable offense it will be presumed that the civil penalty therefor is cumulative; but when the act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." See also 16 Enc. of Pl. & Pr. 239; Reg. vs. Wigg, 2 Salk. 460, Com. vs. Bridge Co., 68 Mass. 67; State vs. Maze, 25 Tenn. 17; People vs. Hislop, 77 N. Y. 331 Com. vs. Evan, 13 Serg. & R. 426; McElhiney vs. Com. 22 Pa. St. 365; Hellings vs. Com., 5 Rawle 63; Journey

vs. State, 1 Mo. 428; Com. vs. Howes, 32 Mass. 231; State vs. Sinnet, 15 Neb. 472; U. S. vs. Laeskl, 29 Fed. Rep. 699; Pentlarge vs. Kirby, 19 Fed. Rep. 501; Carle vs. People, 12 Ill. 285; Reed vs. Railroad, 33 Cal. 212; State vs. Crocroft, 2 Ibid. 233; Battleboro vs. Wait, 44 Vt. 459; Moses vs. Sprague, R. I. 541; Confrey vs. Stark, 75 Ill. 187. But the case of State vs. Snuggs, 85 N. C. 542, is exactly in point, for the act of issuing a marriage license to persons under eighteen years of age was forbidden in one section and the penalty was imposed in another section. Ruffin, J., for the court, said: "The statute not only creates the offense but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the denounced can be inflicted. 1 Russell on Crimes, 49; State vs. Loftin, 2 Dev. & Bat., 31." It was held, therefore, that no criminal offense was charged in the indictment and it was quashed. In this connection, Ruffin, J., at p. 544, further said: "We are convinced that His Honor's ruling in quashing the indictment is correct, in view of the fact that the statute *creates* the offense, affixes the penalty, and prescribes the mode of proceeding—the mention of the *particular* method operating to the exclusion of every other." (Italics ours.) In Loftin's case, 19 N. C. 31, which is relied on by the court in Snuggs' case, and which states the same rule, Judge Gaston, who wrote the opinion, cites with approval Castle's case, Cro. Jac. 64, 1 Salk. 45, and Rex vs. Robinson, 2 Burr. 803, which we have already mentioned as English cases sustaining the rule. The case of State vs. Snuggs was expressly approved in State vs. Bloodworth, 94 N. C. 918 and, by the strongest implication, in State vs. Parker, 91 N. C. 650, and State vs. Addington, 121 N. C. 538. There is no sound reason for, and, not intending to use too harsh a term, no practical sense in the distinction between a statute which prohibits an act to be done and then, in the same section, denounces the penalty and one in which the penalty is imposed in a separate section, and especially can no such rule be applicable to the statute we are now construing, as the legislative intent is unmistakably expressed, that for disobedience to the provision of Section 1, the carrier shall pay a penalty only to the party aggrieved, and the agent shall be liable to indictment for a misdemeanor, and counsel for the State, on the argument, answered a question from the court in such a way as clearly recognized this to be the intention. Being asked why the legislature had discriminated against the agent, the reply was (and undoubtedly the correct one), it was supposed that the penalty could not be recovered from the agent while it could be from the carrier.

But it is suggested that the defendant, while not liable as a principal, for doing the act itself, is liable criminally as accessory before

the fact, having counselled, aided and abetted the agent in the sale of the ticket, and as all accessories in misdemeanors are regarded as principals, the defendant thereby became a principal under the law. This is a very strange, and to our minds, a very illogical argument and a palpable non sequitur. The judge, who presided at the trial, evidently did not take this view of the case, for he charged the jury upon no such theory. He plainly thought that the sale of the ticket by the agent made the defendant, his employee, liable per se. In other words, that the act of the agent was the act of the principal under the first section of the act and the doctrine of State vs. Kittelle, 110 N. C. 560. But he failed, inadvertently, to take into account the fact that in the case cited (if it can be considered as stating a correct rule), there was no special provision in the statute, under which Kittelle was indicted, for penalizing the employer, as there is in the Act of 1907, which brings this case directly within the decision in State vs. Snuggs and takes it out of the principle decided in State vs. Kittelle. In the latter case, Kittelle was held liable for the act of his employee because he held the license to sell liquor, and further upon the principle applying to the law of contracts and civil torts, that the principle must answer for the acts of his agent (Respondeat Superior), and that he who does an act through the medium of another party is in law considered as doing it himself. (Qui facit per alium, facit per se). The difference between that case and this one is manifest. Besides, the defendant here is a corporation and can act only by its agents. It has no personality or individuality. The principal can do no more by his agent than if he were personally present and acting. The very thing the agent does, whether he be the agent of a corporation or of an individual, marks the extent of the principal's liability. It cannot go beyond the limits of the agent's act. So in this case, when the agent sold the ticket, even under the order of his principal, the defendant, he did the very thing and the *only* thing prohibited by the Act of 1907, Ch. 216, for which he and his principal are made liable by the Act, he to an indictment for misdemeanor and the principal to a penalty. How could the defendant, a mere legal entity, commit the act prohibited by the statute except by its agent? The statute itself, by its very terms, recognizes this fact, that the corporation can act only by its agent, and therefore that the act of its agent is what renders it liable for the penalty. If a corporation can act only through its agent, and thereby becomes, in law, completely identified with its agent, how can it be an accessory to his act, for in such case it must be accessory to its own act, which is a legal absurdity.

It appears from the Act of 1907, that a penalty is denounced against the carrier, and the agent is made criminally liable for the same offense, namely, disobedience of the prohibition in Section 1, against charging more than two and a quarter cents per mile. The legislature, by an elementary rule of statutory construction, is pre-

sumed to have had the law, as settled by State vs. Snuggs, in mind, when it passed the Act of 1907, and that act will be construed according to the rule as therein stated. The legislature is presumed to know the existing law and to legislate with reference to it. The case of Kittelle, and cases of its class, do not apply, as no special punishment was provided for the principal in the law upon which they were decided, while in the Act of 1907 there is a special remedy against the principal. The doctrine of accessories does not apply, as we have shown, and the corporation would, even under that doctrine, commit the identical act for which the penalty is provided and, besides, no one can be an accessory to his own act, as already explained. The legislative intent is so clear and unmistakable that it would seem to be impossible to misunderstand what is so plainly expressed.

Much is said in the briefs about the equity of the suit in the Federal Court and the Complainant's right to an injunction. We would not agree with the learned Judge, who issued the interlocutory injunction, if that matter were strictly before us and we were required to pass upon it, for we do not think there was a sufficient disclosure of the facts, which are necessarily within the knowledge of the complainant in that suit (the defendant in this indictment) to entitle it to the favorable consideration of a chancellor. It is a very serious matter to suspend the operation of a public statute and to postpone the execution of the people's will at the instance of a private suitor, even upon the allegation that his property is about to be confiscated, or some other constitutional right is about to be impaired, and it should not be done except upon a *full* disclosure of all the facts in the complainant's possession, and upon the clearest showing that the threatened injury will at least probably result. "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at the final hearing, the writ should be denied." Hall Signal Co. vs. Railway Signal Co., 153 Fed Rep. (C. C. A.) 907; City Signal Co. vs. Railroad Co., 75 Fed. Rep. 1004. It has been held by at least one Federal Court, when considering the identical question presented in this case, that it would be impossible to decide whether the reduction of a rate will be confiscatory in the absence of an actual test of the same. The court held that whether it would be so or not was speculative and mere guess work, and that the testimony of an ordinary business man, expressing his opinion, or even of railway experts also giving opinions and illustrating them by the use of many figures based upon past experience, was not satisfactory and did not relieve the doubt and uncertainty sufficiently to warrant the issuing of a preliminary injunction. Railway Co. vs. Hadley, 155 Fed. Rep. at p. 225. In this case the reports of the defendant to the corporation commission do not tend to diminish the uncertainty as to what effect the lower rate will have upon the defendant's income, but rather to increase it.

It would be natural to suppose that a lower rate would cause increased travel and, while additional facilities must be provided for it, the relative increase of the cost of the latter and of the renumeration from the natural increase in passenger traffic cannot be determined with any degree of certainty except by actual trial. We have carefully examined the opinion of the Federal Court in this matter and have not been convinced thereby that we have erroneously decided any of the questions growing out of the equity suit. We refer especially to Ex parte Wood, 155 Fed. Rep. 190, in which the petitioner, a ticket agent of the defendant, who applied for the writ of habeas corpus, was granted the writ and then discharged for a violation of the Act of 1907. The decision is based upon the ground that the sale of tickets was "an act done in pursance of an order, process or decree of a court of the United States or judge thereof," under Rev. Statutes of U. S. Section 753 (U. S. Comp. Statutes, p. 592). This is giving a very broad and liberal construction to that section. Can it mean that the criminal laws of a State shall be suspended by the order of a single federal judge, even if they conflict with it? We cannot give our assent to such a construction, and we are quite sure that our Chief Justice did not intend to sanction it in the quotation made by the learned Circuit Judge in Ex parte Wood from State vs. Boone, 132 N. C. 1108. He was speaking there of a duty enjoined by a valid federal law not being punishable by the State as a crime, and not merely of one imposed by the order of a federal judge. But it is unnecessary to continue this comment any further, as the defendants in the equity suit must avail themselves of any erroneous ruling therein by exception and an appeal from the decree entered in that suit at the final hearing. We do not think, upon the question of the jurisdiction of the Federal Court, that Mfg. Co. vs. Los Angeles, 189 U. S. 207, and Dobbins vs. Los Angeles, 195 U. S. 241, which are cited in Ex parte Wood, bear any analogy to the equity suit wherein the order of injunction was issued, under which Wood is alleged to have been acting when he sold the tickets. In the former case (189 U. S. 207), Justice Brown clearly distinguishes the two classes of cases from each other. The State in this proceeding is enforcing her criminal laws.

It must not be understood by what we have said, that we are not criticizing the decision of the Federal Court, but merely examining the grounds and reasons upon which it rests, with a view of determining whether it should have any influence upon our conclusion in this case. We always discuss respectfully the decision of other courts, however much we may disagree with them, and it is our pleasure, as well as our duty to do so, for any other course would be most unseemly.

The question here is not whether one who advises or commends a criminal act to be committed is himself liable, nor whether that admitted principle applies to corporations, for it clearly does; nor is it whether a railroad company is liable civilly for any damages caused by

the unlawful act of its agent, which he has been required by the company to do, or which it has afterwards ratified. All these principles are elementary, but they have no application to the facts in this case, no more than the right of a creditor to enforce the payment of a debt legally due to him by his debtor, could have. The question, and the only one is, whether the legislature has created a new offense and prescribed a specific punishment or penalty for its commission, and, if so, whether this does not exclude the common law remedy by indictment. We cannot pervert the meaning of plain words and change the intent of the legislature because able lawyers may have been members of that body. If that be so, more is the reason why we should construe the statute according to its clearly expressed meaning. What the executive shall do, if any emergency has arisen requiring him to act, is not a question in this case, and we have, and should have no suggestion to make as to his duty in the premises. We are assured that, in the independent exercise of his high official functions, he will act wisely and well and for the best interests of the people.

Since this opinion was prepared, we have found that the Supreme Court of the United States in Yates vs. Bank, 206 U. S. 158. has decided the very question presented in this case, precisely as we have in regard to the right to indict. It says: "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability," citing Bank vs. Dearing, 91 U. S. 35. So in a note to Leathers vs. Tobacco Co. (a case decided by this court), which is reported and annotated in 9 L. R. A. at p. 349, it is said at page 392: "If a statute imposes a new duty, and creates a new right, and at the same time provides a specific remedy to punish the neglect of the one and to secure the other, that remedy is exclusive, and no other action lies for an infraction of the statute. But, if a statute recognizing an old right imposes another duty in respect of it, and provides a method of enforcing it, the remedy provided in the statute is cumulative, and existing rights of action are unaffected unless expressly taken away." These authorities treat the principle as elementary and undeniable.

Upon a review of the whole case, our opinion is that the Federal Court had no jurisdiction to enjoin the finding and prosecution of this indictment, and that the suit in that court is virtually one against the State within the meaning and intent of the Eleventh Amendment to the Constitution of the United States. But it is clear that as no criminal offense is alleged in the indictment, there is nothing for us to do but to arrest the judgment.

JUDGMENT ARRESTED.

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